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BULLETIN

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Vol. 11 December 13, 1963 No. 24

MONTHLY TOTALS

During the month of October totals in all categories of work rose, with the exception of criminal and civil matters. The decrease in matters was reflected in the case increase, as matters progressed to the court stage. The greatest increase was in criminal cases. For the second straight month, the increase in civil cases was comparatively small. This is most encouraging, as civil cases comprise two-thirds of the caseload, and once filed, take longer to terminate. The aggregate of pending cases and matters decreased by 512 items during the month, another encouraging sign. Set out below are comparative totals for September and October, 1963.

	September 30, 1963	October 31, 1963	
Triable Criminal	9,506	9,636	+ 130
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,954	15,966	+ 12
Total	25,460	25,602	+ 142
All Criminal	11,092	11,181	+ 89
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,563	18,584	+ 21
Criminal Matters	13,802	13,397	- 405
Civil Matters	13,891	13,674	- 217
Total Cases & Matters	57,348	56,836	- 512

As can be seen from the comparison below, filings and terminations for the first four months of fiscal 1964 are well ahead of those for the same period of fiscal 1963. If this increase is maintained throughout the coming months, the volume of work done in fiscal 1964 will exceed that of fiscal 1963, which was a record-breaking year. The sustained increase in civil terminations is particularly encouraging. What would be even more encouraging, however, would be to have civil terminations outnumber civil filings. Set out below is a comparison of activity for the first four months of fiscal 1963 and 1964.

	First 4 Months Fiscal Year 1963	First 4 Months Fiscal Year 1964	Increase or Decrease Number	%
Filed				
Criminal	10,894	11,160	+ 266	+ 2.44
Civil	8,779	9,391	+ 612	+ 6.97
Total	19,673	20,551	+ 878	+ 4.46

	First 4 Months Fiscal Year 1963	First 4 Months Fiscal Year 1964	Increase or Decrease Number	%
Terminated				
Criminal	9,660	9,824	+ 164	+ 1.70
Civil	7,911	8,366	+ 455	+ 5.75
Total	17,571	18,190	+.619	+ 3.52
Pending				
Criminal	10,505	11,181	+ 676	+ 6.44
Civil	23,698	23,453	- 245	- 1.03
Total	34,203	34,634	+ 431	+ 1.26

October was the first month of the present fiscal year in which the gap between filings and terminations was narrowed. In July, filings were 5.8% ahead of terminations; in August, they were 12.2% ahead; in September 15.2% ahead; and in October, 11.4% ahead. The slight reduction in this upward spiral is encouraging, but it is not until terminations catch up with and outpace filings, that the pending caseload will be reduced.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,252	2,456	4,708	2,305	2,129	4,434
Aug.	2,245	2,228	4,473	1,771	1,852	3,623
Sept.	3,365	2,267	5,632	2,584	1,920	4,504
Oct.	3,298	2,440	5,738	3,164	2,465	5,629

For the month of October, 1963 United States Attorneys reported collections of $10,257,744. This brings the total for the first four months of this fiscal year to $21,497,266. This is an increase of $9,353,648 or 77.02 per cent over the $12,143,618 collected during that period.

During October $4,398,489 was saved in 109 suits in which the government as defendant was sued for $5,571,462. 61 of them involving $2,218,738 were closed by compromises amounting to $587,627 and 23 of them involving $1,426,521 were closed by judgments amounting to $585,346. The remaining 25 suits involving $1,926,203 were won by the government. The total saved for the first four months of the current fiscal year was $16,867,851 and is an increase of $832,390 or 5.19 per cent over the $16,035,461 saved in the first four months of fiscal year 1963.

The cost of operating United States Attorneys' Offices for the first four months of fiscal year 1964 amounted to $5,855,745 as compared to $5,288,092 for the first four months of fiscal year 1963.

The United States Attorneys are to be congratulated on the fine results of their collection efforts. The present increase, if continued, will establish a record-breaking total for the fiscal 1964.

The costs of operating the United States Attorneys' offices continues to rise. Every effort should be made to stop this rise, and to curtail expenses wherever possible. The increase for the first four months of the fiscal year is over a half-million dollars, or 10.7%. This increase has not been offset by an equally high increase in work production.

DISTRICTS IN CURRENT STATUS

As of October 31, 1963, the districts meeting the standards of currency were:

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Judgment Of Acquittal Denied. United States v. Goldring Packing Co., Inc., et al. (S.D. Calif.) On September 30, 1963, following failure of the jury to agree on a verdict after nearly three days of deliberation, defendants renewed their motion for judgment of acquittal. The motion had previously been twice denied, once at the completion of the Government's case, and again at the close of all the evidence. The renewed motion was taken under submission on briefs, and there was no oral argument of counsel. On November 8, 1963, defendants' motion was denied.

The Court, in denying the motion for acquittal, pointed out that the Government's evidence was circumstantial, and stated:

> The court's problem is analyzed, in substance, as follows: From the evidence in the case, having in mind that it is to be viewed in light most favorable to the Government, must the court conclude that as a matter of law the jurors (reasonable minds as triers of fact) must agree that it is reasonable to conclude the defendants were other than guilty. Can reasonable minds disagree on the point, "that a reasonable hypothesis other than guilt could be drawn from the evidence." If reasonable minds must agree, then if a reasonable mind could find that the evidence excludes every reasonable hypothesis but that of guilt, the question is one of fact for the jury, and motion for judgment of acquittal should be denied because in such case it would not follow that as a matter of law the reasonable minds of the jury must be in agreement that a reasonable hypothesis other than guilt could be drawn from the evidence. Based on the foregoing rules, the court concludes that a reasonable hypothesis other than guilt could be drawn from the evidence but does not conclude that the jurors as a matter of law must agree that a reasonable hypothesis other than guilt could be drawn from the evidence.
>
> The defendants' motion for judgment of acquittal is denied.

The indictment in this case was returned on March 14, 1963, and charged that beginning about April 1961, Goldring Packing Co., Inc. and Ideal Packing Company participated in a conspiracy which continued thereafter until at least October 1962, the terms of which were that they agreed (a) to allocate between defendants Goldring and Ideal the business of supplying fresh meat to the U. S. Navy Commissary Store, U. S. Naval Station, Long Beach, California; and (b) to submit non-competitive and collusive bids and price quotations for supplying fresh meat to the U. S. Navy Commissary Store, U. S. Naval Station, Long Beach, California.

On September 30, 1963, the case was set for re-trial on February 4, 1964, at 10:00 a.m.

Staff: Draper W. Phillips and Bertram M. Kantor (Antitrust Division)

Court Denies Defendant Motions to Produce, Inspect And Copy Documents. United States v. Interborough Delicatessen Dealers Association, Inc., et al. (S.D.N.Y.) On November 14, 1963, in a written opinion, the court granted the Government's motion to quash a subpoena duces tecum served by the defendants under F.R. Cr.P. 17(c), demanding the production of the following:

> "All transcripts, summaries and reports of statements or testimony (a) of any defendant herein, corporate or individual and (b) of any other person except for a transcript, summary or report of a statement made to an agent of the United States Government within the meaning of 18 U.S.C. §3500."

And

> "All books, records, papers and documents which (i) relate to this case (ii) are evidentiary and (iii) were obtained, by means other than seizure or process, from any other person."

The Court also denied a motion to inspect and copy the aforesaid documents.

Defendants sought to secure production of memoranda prepared by Government attorneys following interviews with persons who were later indicted, and also sought production of transcripts of testimony made by several of the defendants and other persons during the course of an investigation conducted by the New York State Attorney General under the New York Anti-Monopoly Statute, commonly referred to as the Donnelly Act.

Defendants also contended that they were entitled to inspect the copies of the transcripts of testimony made by the New York Attorney General, in the possession of the Government, on the ground that they were necessary to prepare the possible defense of immunity which may have been afforded the defendants who so testified.

The Court in its opinion noted that transcripts of statements or testimony of defendants are ordinarily not subject to production before trial under Rule 17(c). U. S. v. Murray, 297 F. 2d 812 (C.A.2, 1962); U. S. v. Kahaner, 203 F. Supp. 78 (S.D.N.Y. 1962). He held further that statements or transcripts of testimony of any other person are not subject to inspection before trial, since they are potential witnesses. U. S. v. Murray, supra; U.S. v. Carter, 15 F.R.D. 367 (D.D.C. 1954). The Court determined that defendants were not entitled to the pre-trial production or inspection of memoranda prepared by Government attorneys following interviews had with defendants. D'Aquino v. U. S., 192 F.2d 338 (C.A.9, 1951); U. S. v. Iozia, 13 F.R.D. 335 (S.D.N.Y. 1952).

With reference to the defendants' argument raising the question of immunity, the Court said:

> "I also fail to see any merit in defendants' contention that they may, by having testified before the Attorney General of the State of New York in connection with a possible state Donnelly

Act prosecution, have secured immunity to prosecution in the federal courts for violation of the anti-trust laws. Even assuming that the giving of testimony before the State Attorney General granted the defendants immunity from state prosecution, it is clear that the introduction of that testimony in a later federal criminal prosecution does not violate the Fifth Amendment. Feldman v. United States, 322 U.S. 487 (1944). The defendants' major reliance is upon United States v. H. P. Hood & Sons, Inc., 215 F. Supp. 656 (D. Mass. 1963), probable jurisdiction noted sub nom. United States v. Welden, 32 U.S.L. Week 3125 (U.S. October 15, 1963). The indictment in the Hood case was dismissed as to the defendant Welden because of immunity granted by force of 15 U.S.C. § 32 when he testified before a Congressional committee. The immunity under that statute is limited to '*** any proceeding, suit, or prosecution under sections 1-7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title ***.' The testimony whose transcription is presently sought was given before the New York Attorney General. It was clearly not a proceeding under the federal anti-trust laws. There is no contention or proof of federal participation in the proceedings there. Under these facts, the Hood case is inapposite. While Congress may have constitutional power to grant immunity from state prosecution, Adams v. Maryland, 347 U.S. 179 (1954), there is at present no doctrine holding that a grant of state immunity creates federal immunity as well. Cf. Feldman v. United States, supra."

Concerning the demand to produce documents, papers, etc., furnished by "any other person," the Court denied this application based upon its ruling in an opinion filed on October 31, 1963, in U. S. v. Greater New York Roll Bakers Assn. Inc., et al., 62 Cr. 513 (S.D.N.Y.), wherein the Court held a similar demand to be a "fishing expedition," citing U. S. v. Iozia, supra.

Staff: John J. Galgay, David H. Harris, Irving Kagan and Philip F. Cody (Antitrust Division)

Court Denies Motion to Quash and Orders Parties to comply in Anti-trust Grand Jury Proceedings. Misc. 86 and 89-Phx. (D. Arizona). On June 25, two officials of Continental Oil Company were brought before Judge Ling, sitting in Phoenix, Arizona for the United States District Court, and charged in open court with refusing to testify before the grand jury on the ground that their testimony might tend to incriminate them. It was further disclosed by Continental counsel that each of them had testified before the grand jury on previous occasions concerning a transaction discussed in a meeting of said Continental witnesses with an official of Standard Oil Company of California, who also had testified before the grand jury. Counsel for said officials and for Continental Oil Company argued that the immunity from prosecution they secured from previous testimony attached only with respect to any violation of the antitrust laws, that since the witnesses had previously

testified fully concerning the conversations it appeared that the interrogation where they refused to testify was directed toward evidence of possible perjury or conspiracy to obstruct justice, and urged that the witnesses should not be compelled to testify when there was a possibility by so doing they were making themselves liable for prosecution for perjury. The argument was made out of the presence of the grand jury but not out of the presence of newspaper reporters who carried a story in the local newspapers. The Court directed the witnesses to testify and thereafter said witnesses appeared and testified.

The present proceeding grows out of subpoenas duces tecum issued to Standard Oil Company of California, its official concerned in the above transaction, to Continental Oil Company, its two officials, and to their respective counsel, seeking documents moving from Standard Oil, its official, or counsel, to the Continental parties and Continental counsel, and also documents moving from the Continental parties, and Continental counsel to the Standard Oil parties including Standard counsel. Counsel for both Standard Oil and for Continental moved to have the subpoenas quashed, but in supporting affidavits counsel admitted they had transmitted to each other information pertaining to testimony given by witnesses of their respective companies before the grand jury.

Their affidavits disclosed that the officials had testified before the grand jury, that their respective counsel had interviewed the witnesses immediately after their appearance and obtained statements from them, and that these statements were exchanged between counsel. The movants claimed the subpoenas required production of documents which were (1) privileged communications between attorney and client and (2) the work product of attorneys. At the hearing before Judge Ling, the Government took the position that the communications were not privileged under the special circumstances of the exchange. On November 7, 1963, Judge Ling denied the motions to quash and entered an order requiring the parties to comply. A date for compliance was fixed and counsel for the subpoenaed parties indicated they desired to appeal the ruling but not by contempt proceedings. The order for compliance was subsequently stayed after the parties filed a notice of appeal (Ninth Circuit).

Staff: Stanley E. Disney, Lawrence W. Somerville and James M. Legnard. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

GOVERNMENT CONTRACTS - DISPUTES CLAUSE, WUNDERLICH ACT

Disputes Clause of Government Contract Applies to All Fractual Disputes Arising Under Contract, Whether They Arise During Performance of Contract or After Its Completion. Silverman Bros. v. United States (C.A. 1, November 15, 1963). Defendant entered into a contract to supply the Government with parts of detonators. The contract contained a standard disputes clause which provided that any dispute concerning a question of fact arising under the contract would be decided initially by the contracting officer, with a right of appeal to the Armed Services Board of Contract Appeals.

When defendant was late in its performance, the contracting officer determined that the delays were the responsibility of defendant and terminated its right to make deliveries. The contracting officer purchased the parts from other suppliers, and later determined the amount of the excess costs sustained as a result of defendant's default.

Defendant took timely appeals from both determinations to the Board, where it was afforded a full trial-type hearing, at which it was represented by counsel, and witnesses for both sides appeared. Defendant contended that the contract had been terminated without justifiable cause, that the delays were due to faulty Government instructions, and that the replacement costs were unreasonably high. The Board entered factual findings adverse to defendant, and sustained the contracting officer's determinations.

The Government then brought suit in a district court for the excess costs, and moved for summary judgment on the basis of the administrative record and the Board's decision. The district court entered summary judgment for the Government.

Defendant restricted its appeal to the question of the coverage of the disputes clause. Its sole contention was that it was entitled to a trial de novo in the district court on the ground that the clause was inapplicable to disputes which arose out of or after the termination of the contract, and to disputes which pertained to issues of law. The Court of Appeals rejected these contentions, and ruled broadly that the disputes clause covers and includes any dispute concerning a question of fact arising under the contract, whether the dispute arises during performance of the contract or after its completion. Pursuant to the recent Supreme Court decision in United States v. Carlo Bianchi (373 U.S. 709), it held that the function of the trial court was restricted to reviewing the administrative record, and that the district court was therefore correct in entering summary judgment for the Government.

Although the decision of the Court of Appeals was consistent with some recent decisions of the Second Circuit (e.g., United States v. Hamden Cooperative Creamery Co., 297 F. 2d 130), as the Court expressly recognized, its broad reading of the disputes clause was contrary to some earlier appellate decisions which had held the clause inapplicable to disputes arising during or after termination (e.g., E.I. Dupont de Nemours v. Lyles & Lang Construction Co., 219 F. 2d 328 (C.A. 4), certiorari denied, 349 U.S. 956; United States v. Duggan, 210 F. 2d 926 (C.A. 8)).

Staff: David L. Rose (Civil Division)

FHA SECURITY INTEREST

Liability of Auctioneer for Sale of Property in Which FHA Possessed Security Interest Governed by Federal Law; Federal Law Imposes Liability on Auctioneer for Sale of Property Covered by FHA Security Agreement Without Actual Knowledge of Such Coverage; United States Had Not Waived Its Right of Recovery. United States v. Sommerville (C.A. 3, November 14, 1963). This conversion action was brought against an auctioneer who, without actual knowledge of the Government's interest, had sold property covered by an FHA security agreement. The district court, after trial, rendered judgment for the Government.

The Third Circuit affirmed. That Court held, first, that federal law governed the question of the auctioneer's liability, and that the need for uniform results inherent in the comprehensive loan program of the Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1007 (1958 ed.) (now 7 U.S.C. 1941) dictated that the courts fashion a general federal rule rather than adopt, as federal law, the governing rules of the several states. In so rejecting the adoption of state law as the federal rule, the Third Circuit joined the Ninth Circuit (United States v. Matthews, 244 F. 2d 626) in its disagreement with the Fourth and Eighth Circuits (United States v. Union Livestock Sales Co., 298 F. 2d 755, and United States v. Kramel, 234 F. 2d 577, respectively). Additionally, the Court of Appeals held that federal law imposed liability on the auctioneer in the circumstances of this case, and that the United States had not waived its right to maintain the action by failing to inform the auctioneer of its interest and in delaying the commencement of suit for two years.

Staff: Alan S. Rosenthal and Edward A. Groobert (Civil Division)

MILITARY SEA TRANSPORTATION SERVICE

Agreement Between MSTS and Shipping Line Not Exclusive in Absence of Express Provision; MSTS May Ship at Rates Scheduled Under Agreement or Via Regular Government Bill of Lading, Whichever MSTS Determines to Be to Government's Advantage. United States Lines Co. v. United States (C.A. 2, November 8, 1963). U.S. Lines sought an additional $340,000 for

shipments of privately owned vehicles (the property of Defense Department personnel) between England and America carried at the behest of MSTS. The carrier had an Agreement with MSTS which provided special shipping arrangements for Defense Department cargoes transported on the carrier's regularly scheduled vessels. The rate for shipping cars under that Agreement was nearly twice the rate available to ordinary private shippers under the carrier's regular commercial tariffs. When the rate discrepancy came to the attention of senior MSTS officials, they instructed that, henceforth, all privately owned vehicles would be shipped only in the regular commercial manner under Government bills of lading rather than under the arrangements--and at the higher rates--called for in the Agreement. The carrier transported the cars, but endorsed the Government bills of lading "freight rate in dispute" and sued to recover the difference in charges between the Agreement rates and the commercial tariff.

The district court dismissed the carrier's libel and the Second Circuit affirmed. The Court of Appeals ruled that nothing written in the Agreement precluded the Government from electing to ship at the more attractive commercial rates when it so chose. In reaching this conclusion, the Court noted that the Agreement did not require the Government to ship any cargo at all with U.S. Lines, and that the carrier was not required to keep any space available for MSTS. The appellate court also held that the district judge's finding, based on extrinsic evidence that the parties to the Agreement had not intended an exclusive arrangement, was not clearly erroneous.

Finally, the Court of Appeals rejected U.S. Lines' argument that the Government bill of lading itself called for "special services" available only under the Agreement and not under commercial tariff. The Court held that the evidence showed that one so-called special service--movement of cargo direct to military piers rather than to the carrier's own piers--was available to any large volume shipper, and that the other--waiver of the one year limitation period of the Carriage of Goods by Sea Act, 46 U.S.C. 1303(6)--was part of the printed form bill of lading used by the Government in its shipping transactions generally.

Staff: Richard S. Salzman (Civil Division)

SOCIAL SECURITY ACT

Lack of Bona Fide Employment Relationship by Reason of Family Relationship Question of Fact on Which Administrative Decision Is Conclusive if Supported by Substantial Evidence. Domanski v. Celebrezze (C.A. 6, November 4, 1963). Claimant, at the age of 57, came to the United States from Germany, where he had been a postal employee and, for a while, a shoemaker. He and his wife lived with their daughter and son-in-law, who provided a home for the parents, supported them, and counted them as dependents for tax purposes. Claimant assisted his son-in-law in construction, painting, clearing land, shoveling show, and

general maintenance. In 1956, because the son-in-law's business required more of his time, claimant took over more of the work about the house and grounds. At this time the son-in-law agreed, at claimant's request, to pay him $5.00 per week. The payments were made until July 1, 1959, when application was made for old age benefits, on the basis of payments for 12 quarters, the minimum number required for eligibility. No deductions were made for social security taxes nor were any taxes paid. No social security number was applied for. After the payments stopped, there was no change in the duties performed by the claimant nor in the support accorded by the son-in-law.

The district court ruled that, as a matter of law, claimant was an employee of his son-in-law. The Court of Appeals, one judge dissenting, reversed on the ground that substantial evidence supported the administrative finding of the ultimate fact that no genuine employer-employee relationship existed and that the district court was therefore bound by such finding of fact.

Staff: Pauline B. Heller (Civil Division)

DISTRICT COURT

NATIONAL SERVICE LIFE INSURANCE

Where Widow's Award of Benefits Is Later Terminated Administratively, Limitations Held to Run Only From Such Termination Rather Than From Date of Death. Tubongbanua v. United States (D. D.C., November 13, 1963). Plaintiff, the widow of a serviceman who died in 1942, was awarded his gratuitous National Service Life Insurance by the Veterans Administration, based on her claim filed about five years and two months after the death. After a number of years, installment payments were suspended pending inquiry into plaintiff's marital status (a widow's continuing entitlement being dependent upon her remaining unremarried). Finding plaintiff to be "remarried," the V.A. formally terminated her award in 1961. This suit for restoration of benefits was filed more than one year thereafter. In accordance with existing policy, the Government did not defend the V.A. finding of "remarriage" but did urge that the suit was time-barred. On cross-motions for summary judgment, Judge Holtzoff ruled for plaintiff, holding that the applicable six-year limitations period (38 U.S.C. 784 (b)) began to run from the date that benefits were terminated. This ruling is in direct conflict with Samala v. United States, 183 F. Supp. 601 (D. D.C. 1960), which held upon similar facts that the statutory limitations period begins to run from the date of insured's death, and is only suspended from the filing of the claim to the final termination. See also Morgan v. United States, 115 F. 2d 427 (C.A. 5, 1940), certiorari denied, 312 U.S. 701 (1941); Bono v. United States, 113 F. 2d 724 (C.A. 2, 1940); cf. United States v. Towery, 306 U.S. 324 (1939).

Staff: David V. Seaman (Civil Division)

STATE COURT

UNEMPLOYMENT COMPENSATION FOR FEDERAL EMPLOYEES

Findings of Employing Agency as to Reason for Federal Employee's Discharge Are, Pursuant to 42 U.S.C. 1367, Final and Conclusive and Not Open to Judicial Review; Discharge Because of Arrests, Unsatisfactory Employments and Intentional Falsification of Employment Application Constitutes Discharge for "Misconduct Connected with * * * Employment" Within Meaning of Applicable State Statute. Thompson v. Brown, et al. (Louisiana Third Circuit Court of Appeals, October 30, 1963). This action for unemployment compensation benefits was commenced by a former federal employee who had been discharged because of arrests, unsatisfactory employments and falsification of an employment application. Pursuant to 42 U.S.C. 1362(a), the State of Louisiana was acting as agent of the Federal Government for purposes of employment compensation. The appropriate State agency denied the claim because discharge had been based on misconduct, which constitutes disqualification for benefits, and the State district court affirmed.

The Louisiana Third Circuit Court of Appeal, the intermediate appellate court, affirmed. It held that (1) the employing agency's findings as to the cause of discharge are conclusive under the federal statute, 42 U.S.C. 1367, and not open to judicial review, and (2) under the applicable state law, Revised Statutes of Louisiana, Title 23, Section 1601 (2), such findings supported the conclusion that discharge was for "misconduct connected with * * * employment," thus disqualifying the claimant for benefits.

Staff: United States Attorney Edward L. Shaheen; Assistant United States Attorney Leven H. Harris (W.D. La.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections; Deprivation of Rights Under Color of Law and Conspiracy; 18 U.S.C. 242 and 371. United States v. James Ramey, Jr. and Louise Ramey (S.D. West Va.). A jury returned guilty verdicts against Constable James Ramey, Jr., and his wife, Louise Ramey, a justice of the peace, on November 8, 1963, for violations of 18 U.S.C. 242 and 18 U.S.C. 371 (conspiracy to violate 18 U.S.C. 242). (See 11 United States Attorneys' Bulletin 19, p. 498.) Judge John A. Field, Jr., sentenced James Ramey to one year on each of the two counts under which he had been indicted, to be served concurrently; and he sentenced Louise Ramey to one year on the count under which she had been indicted, but suspended sentence.

The case grew out of the arrest by Constable Ramey and incarceration of an election official in the early hours of the morning of election day, November 6, 1962, on a false charge of rape, issued by Ramey's wife. The official intended to challenge the votes of all persons in the precinct believed to be illegally registered to vote in the election, in which Ramey was a candidate.

The Government showed that the complaint form purportedly signed by one "Mary Marcum" on November 2, 1962, and the warrant form, executed on November 6, 1962, were actually forms which Ramey had secured from a Wayne County Justice of the Peace on November 5, 1962. Defendant Louise Ramey took the stand and testified that her husband had not earlier served the warrant because of a protracted absence from the county. The Government produced a number of witnesses who testified that they saw Ramey at home or in and around the county during the time the defendants maintained he was absent. Circumstances strongly suggestive that "Mary Marcum" was fictitious were also adduced.

The Court denied a motion to dismiss the count against Louise Ramey based upon her claim of judicial immunity. Defendant relied upon United States v. Chaplin, 54 F. Supp. 926 (S.D. Cal., 1944). The Government successfully maintained that the Chaplin case had been vitiated by the subsequent decision of the Supreme Court in Screws v. United States, 325 U.S. 91 (1945). The Government further argued that the considerations which have supported claims of judicial immunity in some of the civil cases do not apply to a prosecution under 18 U.S.C. 242.

Staff: United States Attorney Harry G. Camper, Jr.; Assistant United States Attorney George D. Beter (S.D. West Va.); Henry Putzel, Jr., Edgar N. Brown (Civil Rights Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

COINS AND CURRENCY

Fraudulent Alteration (18 U.S.C. 331). In 1962 the Department determined that an alteration of the mint mark or date on a genuine United States coin, with intent to defraud coin collectors, was not a violation of 18 U.S.C. 331. (See U.S. Attorneys Bulletin dated December 28, 1962 (Vol. 10, No. 26, page 711).) This determination was made in concurrence with a 1956 opinion rendered by the General Counsel of the Treasury Department.

Subsequent to the above determination, an informal hearing was held by the U.S. District Court, Utah, to reconsider the cases of United States v. W.K. Tilton, United States v. D.R. Tilton, United States v. R.D. Brown and A. Wright. In each of these cases the defendants, upon a plea of guilty, had been convicted and sentenced for altering the mint mark of a United States coin with intent to defraud coin collectors, in violation of 18 U.S.C. 331. After hearing arguments, Judge Christensen decided that the fraudulent intent requirement of the statute is not restricted to a fraud against the Government, but rather emcompasses any fraudulent purpose. It was therefore found that defendants had properly been charged with the commission of a Federal offense, and the convictions were not set aside.

This ruling is consistent with the reported decisions involving the analogous situation of altering postage stamps with intent to defraud collectors. (See Errington v. Hudspeth, 110 F. 2d 384 (C.A. 10, 1940), certiorari denied 310 U.S. 638, and United States v. Rabinowitz, 176 F. 2d 732 (C.A. 2, 1949), certiorari denied 338 U.S. 884.) We perceive no sound basis for distinguishing between altering an obligation with intent to defraud and fraudulently defacing a coin. The position now taken by the Department of Justice is that the opinion of the District Court of Utah, that such activity constitutes a violation of Section 331, is correct. This position is concurred in by the Department of Treasury.

TREASURY CHECKS

Program to Reduce Theft and Forgery of Treasury Checks. In July, 1961, each United States Attorney received a letter stating the Department's support of the request by the Postmaster General for increased attention toward prosecution of mail theft cases involving United States Treasury checks. The letter pointed to the preventive measures taken by the Post Office Department to insure that all mail, particularly United States Treasury checks, was safely received by the addressee, and also its close cooperation with Secret Service Agents, Federal Narcotic Agents, as well as state and local law enforcement agencies. The Secret Service formally requested this program be extended

to prosecution of forgery cases involving United States Treasury checks.

Many United States Attorneys thereafter submitted suggestions for making this program more effective. Representatives of the various divisions of the Post Office Department, Veterans Administration, Social Security Administration, Secret Service, Disbursing Office, Office of Administrative Services, Government Printing Office and the Criminal Division of the Department of Justice have met periodically over the past two years to consider and implement such suggestions.

One suggestion made by several United States Attorneys was to replace the brown conventional style check envelopes. Since it was thought that such a change might reduce the identifiability of United States Treasury checks and thereby reduce thefts, this suggestion was tested for some 56 million checks issued in Chicago for the eight-month period ending in July, 1963. In the first months of the trial period the number of reported cases was substantially reduced, but that reduction largely disappeared toward the end of the trial period. This suggested that the use of any one color soon became identified with United States Treasury checks. Efforts are now being made to place into use random-color envelopes. It is also hoped that either the color of the checks themselves can be changed to random colors, or that envelope window inserts of random colors can be used so as to lessen the identifiability of the United States Treasury checks when inside the envelopes. Continued attention is being given to "Cycle-mailing" of checks, thus eliminating a "feast-period" for professional thieves near the beginning of each month. Efforts are now in progress to reduce the amount of printed identifying data appearing on the outside of such envelopes.

The volume of such mailed checks was 460 million last fiscal year and is expected to rise to 489 million during the current fiscal year. When this program of increased attention was begun, the rate of reported cases was approximately 102 cases per million of mailed checks. During the last fiscal year this rate was reduced to 100 cases per million.

Those persons studying this problem expressed appreciation of the manner in which prosecutions were handled, and with the substantial quantity of the sentences imposed by the courts - often based upon information of local conditions obtained by the United States Attorneys from local Secret Service Agents or Post Office Inspectors and relayed to the court by the United States Attorney. (See Vol. 10 of United States Attorneys Bulletin, No. 19, September 21, 1962, page 552.) Continuation of these efforts is desirable.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Internal Security Act of 1950, Section 6 (50 U.S.C. 785); Incomplete Passport Applications. Mayer v. Rusk (D.D.C.). On November 3, 1963, a three-judge District Court in the District of Columbia sustained the authority of the Secretary of State to require an applicant for a passport to state under oath, as a condition precedent to the processing of his passport application, that he is not a present member of the Communist Party of the United States, or give an explanation of his inability to make such an affirmation.

Staff: Benjamin C. Flannagan (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation: Appellate Standard of Review of District Court Disposition of Rule 71A(h) Commission Reports; Lack of District Court Power to Substitute Its Judgment for Commission's As to Market Value. United States v. Rainwater (C.A. 8, Nov. 19, 1963). D.J. File 33-4-275-288. A Rule 71A(h) commission returned a seven-page report fixing just compensation for a 20-acre tract of Arkansas farm land at $2,700, precisely the amount of the Government's high testimony and $2,000 to $3,000 under the landowner's figures. Without holding a hearing, the district court stated that it was "convinced that the market value of the land on the date of the taking was in excess of the compensation awarded," held the findings clearly erroneous, and increased the award to $3,356.25.

On appeal, the Government contended that, in accordance with earlier Eighth Circuit decisions under Rule 53(e)(2), the "clearly erroneous" standard of that rule is to be applied to the findings of the commission and not to the findings of the district court, as would be done under United States v. Twin City Power Company, 248 F.2d 108, 112 (C.A. 4, 1957), cert. den., 356 U.S. 918, and United States v. Twin City Power Company of Georgia, 253 F.2d 197, 201-204 (C.A. 5, 1958). The court considered these cases, along with United States v. Waymire, 202 F.2d 550, 553-554 (C.A. 10, 1953), United States v. Certain Interests in Cumberland County, 296 F.2d 264, 269 (C.A. 4, 1961), and United States v. Carroll, 304 F.2d 300, 304 (C.A. 4, 1962), and concluded:

> From our analysis of the opinions in the foregoing cases we believe it is debatable whether the rule promulgated therein is as drastic as the Government claims it to be. Suffice to say that it is at least doubtful whether under such rule the findings of the district court are so completely insulated that the court of appeals is precluded from giving consideration to the Commission's findings of fact in determining whether the district court properly held such findings were clearly erroneous.

Applying either the standard of its own earlier cases or that of the Fourth and Fifth Circuits, the court could find "no sound basis for sustaining the district court's action." The landowner had simply challenged the award as inadequate without claiming arbitrariness, misapplication of law, or lack of evidentiary support. The district court's action "was not premised on any valid legal basis"; on the contrary, "the court chose to substitute his judgment for the judgment of the members of the Commission. This he was not permitted to do." The court remanded the case with instructions to enter judgment in the amount of the commission's award.

District Judge Robinson concurred in the opinion but dissented from the order directing entry of judgment for the original award. He reasoned that Rule 53(e)(2) provided that the district court could hold a hearing or

receive further evidence, and that the mandate of the court of appeals should not foreclose him from exercising these powers even though the landowners had made no request for exercise of that power.

Staff: Hugh Nugent (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
District Court Decision

Sufficiency of Indictment Under Section 7206(1), Internal Revenue Code of 1954 and 18 U.S.C. 1001. United States v. Edward Jaben (W.D. Mo., November 29, 1963). The Court here was asked to dismiss an indictment charging offenses under the statutes cited above in the general forms set forth in "The Trial of Criminal Income Tax Cases", (Forms 30 & 33) on the grounds that it was defective as to form. The Court filed a memorandum opinion denying the motion, and ruled that "there can be no doubt that the form of the indictment is in full compliance with Rule 7 of the [Federal] Rules of Criminal Procedure".

Staff: K. William O'Connor and Stephen Koplan (Tax Division)

Appellate Decisions

Causing Filing of False Return; Instructions Relating to Accomplice Evidence. James F. Hull v. United States (C.A. 5, November 14, 1963) (63-2 U.S.T.C., par. 9821). Defendant was convicted on eight counts of a fifteen-count indictment charging him with causing the filing of false income tax returns, in violation of Section 7206(2), 1954 Code. He was acquitted on three other counts, and the jury was unable to agree as to the remaining four counts. The Counts upon which he was convicted related to tax returns he prepared for three salesmen for the O. T. M. Corporation. Defendant was a shareholder and secretary, treasurer and auditor of that corporation. The salesmen's compensation consisted of salary, car, expenses and commissions. Defendant told the salesmen that the commissions were to be treated as reimbursed expenses, and so they were not to be reported as income. These commissions were much greater than their expenses, and often exceeded their regular salaries.

The Fifth Circuit held that the evidence was sufficient to support the guilty verdict. It reversed and remanded, however, on the ground that the Court should have specially instructed the jury on weighing the credibility of accomplice evidence, i.e., the salesmen's testimony. Defendant had requested an instruction on this point, and the Fifth Circuit held it was properly rejected because it incorrectly stated the law. It held, however, that in view of this request and defendant's later objections to the charge as given, the trial judge committed reversible error by not giving a proper instruction on accomplice testimony.

Staff: United States Attorney Woodrow Seals and Assistant United States Attorneys Fred C. Hartman, Scott T. Cook and Jerald David Mize (S.D. Texas).

False Statements; Materiality; Hearsay Evidence. Alfred G. Sica v. United States (C.A. 9, November 18, 1963). Defendant submitted an affidavit to the Internal Revenue Service, during its investigation of Mickey Cohen, in which he stated that although he knew Cohen socially, he had had no direct or indirect business connections with him. An indictment was returned against him alleging that by submitting this affidavit he wilfully concealed a material fact and made a false statement in a matter within the jurisdiction of the Internal Revenue Service. Evidence was offered which showed that he had had business dealings with Cohen. The Ninth Circuit held that the evidence was sufficient to support the conviction, and that the statement was material to the Service's investigation into Cohen's tax liabilities.

The Government showed that defendant was present during certain negotiations between Cohen and two rival cigarette vending machine concerns to guarantee Cohen's neutrality in their competition. $5,000 was paid to defendant, at Cohen's direction. Cohen also received $3,000. As corroboration of this evidence, the Government introduced a letter referring to the $3,000 payment to Cohen, and three checks which traced the source of this money to one of the vending machine companies.

Defendant unsuccessfully objected to the admission of this corroborative documentary evidence as hearsay. The Ninth Circuit affirmed, with one dissent. It held that this evidence was not covered by the hearsay rule, or at least came within an exception to it, because it was not presented for the truth of the matter asserted. It constituted circumstantial evidence tending to corroborate the testimonial evidence of defendant's and Cohen's participation in the competition between the two vending machine companies.

The majority also held that even if the evidence were inadmissible hearsay it was not prejudicial, for it was purely cumulative. They further held that although the defense would have been entitled to a limiting instruction on this evidence had it been requested, the court's failure to give such an instruction without being so requested by defendant was not reversible error.

Staff: United States Attorney Francis C. Whelan and Assistant United States Attorneys Thomas R. Sheridan and Robert E. Hinerfeld (S.D. Calif.).

CIVIL TAX MATTERS
District Court Decisions

Priority Between United States Tax Claims and Surety for Balance of Fund Retained by United States Prior to Time Contractors Filed Their Petitions in Reorganization. In the Matter of Bruce Construction Co., Debtor. In the Matter of Miami Station, Inc., Debtor. (S.D. Fla., April 30, 1963). (CCH 63-2 USTC ¶9812). As a result of two contracts between the debtor corporations and the United States, the Government held a fund due under

the contracts. Claimants were the United States for taxes, the trustee of the corporations for distribution of part of the fund to the general creditors and for administrative expenses, the attorneys for fees for legal services which directly contributed to the creation of the fund, and the surety as legal or equitable owner of the fund because it had completed the contracts following the contractor's default.

The Court held that under the surety contract and the bonds furnished in accordance with the Miller Act, the surety acquired an equitable lien which dated back to the date of the contract suretyship. The Court held that the Government could offset its tax claims against any funds held by another branch of the Government provided that such funds were owed directly to the taxpayer. The Court also awarded attorneys' fees and expenses of administration.

This case is being appealed to the United States Circuit Court of Appeals for the Fifth Circuit.

Staff: Former United States Attorney Edith House (S.D. Fla.).

Injunction; Motion to Vacate Injunction Under Rule 60(b), F.R.C.P. Arnold Schildhaus v. Moe (S.D. N.Y., September 27, 1963.) (CCH 63-2 USTC ¶9754). Plaintiff in this action sought to enjoin collection of taxes for the alleged reason that the District Director had failed to mail a notice of deficiency to him at his last known address as required by Section 6212 of the Internal Revenue Code of 1954. The District Court ruled in favor of plaintiff and enjoined collection of these taxes upon the condition that plaintiff should not plead or otherwise assert any defense based upon any statute of limitations in any subsequent proceeding involving the collection or claim for refund for these taxes. Plaintiff appealed from this final order and the Government did not cross appeal. On appeal to the Court of Appeals for the Second Circuit, the Government urged that the entire District Court holding should be reviewed, including the Court's determination that the deficiency notice was not sent to the taxpayer's last known address. The Court of Appeals in declining to review the entire decision below stated that if the whole matter were before the Court it would be inclined to conclude that the District Court's finding lacked support in the record and that the record seemed to indicate that the Director did send the statutory notices to the taxpayer's last known address. Under these circumstances the Court did not review the entire finding of the District Court. With regard to a conditional decree, the Court of Appeals found no authority in any case or in any statute to support that ruling and modified the lower court's decision to eliminate that condition. The District Director, under Rule 60(b) F.R.C.P., filed a motion with the District Court to open the decree and set aside the order granting the injunctive relief.

On September 27, 1963, the United States District Court for the Southern District of New York filed its memorandum opinion in which it granted the Director's motion to vacate injunction and concluded that plaintiff, Schildhaus,

by his own acts deliberately sought to keep his address unknown, or at least difficult to ascertain. The Court held that the plain meaning of Section 6212 is that the notice of deficiency is to be sent to the place which, within the knowledge of the sender, is the address where mail is most likely to reach the addressee. Such an address was used in the present case. Therefore, the address used by the Director was justified and if plaintiff did not receive that notice it was a result of his own activity.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney John Paul Reiner (S.D. N.Y.).

State Court Decision

Priority of Liens: Federal Tax Liens, Filed in County Wherein Taxpayer Resides, Accorded Priority Over Judgment Against Taxpayer's Debtor Subsequently Docketed in County in Which Debtor Resides. Sidney W. Mintz v. Irving L. Fischer and United States. (N.Y. Sup. Ct., August 7, 1963.) (CCH 63-2 USTC ¶9740). The United States made assessments in 1961 against taxpayer, Irving L. Fischer, and tax liens were filed thereon in Queens County, his place of residence, on October 17, 1961, and November 1, 1961. Sidney W. Mintz secured a judgment against taxpayer which was docketed in Bronx County on March 2, 1960, and in New York County on January 25, 1962. Robert P. Sheldon, Inc., a real estate brokerage house doing business in New York County, was indebted to taxpayer, and on January 30, 1962, a third-party subpoena in aid of Mintz's judgment was served on said real estate brokerage house. Mintz, the judgment creditor, claims priority of his judgment lien contending that the United States was required to file its notice of lien in New York County, in the place of residence of taxpayer's debtor, Robert P. Sheldon, Inc. The Court held that the filing of notice of tax lien in Queens County gives priority to the claim of the United States. The Court pointed out that the nature, scope and operation of federal tax liens are a matter of federal law, and that generally, the federal cases dealing with the question are to the effect that no filing is required other than at the place or residence of the owner of intangible personal property. United States v. Eiland, 223 F. 2d 118, 122; United States v. Kings County Iron Works, Inc., 224 F. 2d 232; Matter of Cle-Land Co., 157 F. Supp. 859; Weir v. Corbett, 158 F. Supp. 198. In addition, the Court went on to say that since the debt came into existence after the filing of the involved tax liens, it is, in this instance, after-acquired property and subject to the tax liens. Glass City Bank v. United States, 326 U.S. 265, 268. Furthermore, the Court said that the New York Lien Law requires a filing in the county where the property is located, only in the event that the property is in existence at the time the tax lien arises. In this case, however, the debt was not in existence at the time notice of tax lien was filed in Queens County, and therefore, the filing in Queens County, the county of taxpayer's residence, satisfies the New York statute.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys John Paul Reiner and Arthur S. Olick (S.D. N.Y.).

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