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UNITED STATES ATTORNEYS

BULLETIN

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Vol. 12 March 6, 1964 No. 5

IMPORTANT NOTICE

If Credit Union facilities are not locally available to the employees of any United States Attorney's office they may be interested to know that they are eligible for membership in the Department of Justice Credit Union in Washington. Please direct inquiries or application for membership to Mr. James W. Grant, Assistant Treasurer, Manager, Department of Justice Credit Union, Room 1644, Department of Justice Building, 9th and Pennsylvania Avenue, Northwest, Washington, D. C.

CORRECTION

In paragraph 3, page 47, number 3, volume 12, of the Bulletin the figure $20,000 should be changed to read $20.00.

MONTHLY TOTALS

Case filings continue to outnumber case terminations and caseload continues to rise. During the seven months of fiscal 1964, the number of cases filed has averaged 4,993, whereas the number terminated has averaged only 4,703. It is obvious that with 300 more cases filed each month than are terminated, the caseload cannot be reduced. With approximately 665 Assistants on duty as of January 31, 1964, the present rate of terminations averages out to seven cases per month per Assistant, or less than two cases per week. Unless this rate can be stepped up in the remaining months of the fiscal year, the caseload will show a substantial increase on June 30, 1964. That it can be stepped up is shown in the fact that for the month of October, 1963, terminations totaled 5,629, or almost 20 per cent above the monthly average.

	First 7 Months Fiscal Year 1963	First 7 Months Fiscal Year 1964	Increase or Decrease Number	%
Filed				
Criminal	18,720	19,061	+ 341	+ 1.82
Civil	15,163	15,890	+ 727	+ 4.79
Total	33,883	34,951	+ 1,068	+ 3.15
Terminated				
Criminal	17,903	18,251	+ 348	+ 1.94
Civil	14,245	14,672	+ 427	+ 3.00
Total	32,148	32,923	+ 775	+ 2.41

	First 7 Months Fiscal Year 1963	First 7 Months Fiscal Year 1964	Increase or Decrease Number	%
Pending				
Criminal	10,158	10,571	+ 413	+ 4.07
Civil	23,476	23,616	+ 140	+ 0.60
Total	33,634	34,187	+ 553	+ 1.64

Terminations during January were higher than for the two preceding months, and constituted the second largest total in this category for the first seven months of fiscal 1964. This rise in terminations, however, was offset by the increase in case filings, which reached the third highest total in fiscal 1964. Terminations exceeded filings in only two of the past seven months. If the caseload is to be reduced, this trend must be reversed so that terminations exceed filings every month.

	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
Nov.	2,794	1,789	4,583	3,020	1,806	4,826
Dec.	2,252	2,214	4,466	2,554	2,039	4,593
Jan.	2,855	2,496	5,351	2,853	2,461	5,314

For the month of January, 1964, United States Attorneys reported collections of $5,738,545. This brings the total for the first seven months of fiscal year 1964 to $35,824,920. Compared with the first seven months of the previous fiscal year this is an increase of $12,913,538 or 56.36 per cent over the $22,911,382 collected during that period.

During January, $3,808,466 was saved in 104 suits in which the government as defendant was sued for $4,939,751. 54 of them involving $1,951,539 were closed by compromises amounting to $297,381 and 23 of them involving $2,047,134 were closed by judgments against the United States amounting to $833,904. The remaining 27 suits involving $941,078 were won by the government. The total saved for the first seven months of the current fiscal year aggregated $50,767,639 and is an increase of $20,867,905 or 69.79 per cent over the $29,899,734 saved in the first seven months of fiscal year 1963.

The cost of operating United States Attorneys' Offices for the first seven months of fiscal year 1964 amounted to $10,108,970 as compared to $9,379,846 for the first seven months of fiscal year 1963. If projected to the end of the year, this increase will amount to approximately $1.5 million. If the rise in cost of operation were accompanied by an equivalent or greater rise in production, the increase in expenditures would not be difficult to justify. As it is, however, the 7.7 percent jump in costs is accompanied by an average 2.7 percent rise in production. This sort of imbalance is difficult to explain to

an economy-minded Appropriations Committee. The present force of Assistants is larger and has a higher average salary than ever before, yet the rate of terminations per Assistant continues to lag behind those of prior years.

DISTRICTS IN CURRENT STATUS

As of January 31, 1964, the districts meeting the standards of currency were:

CASES

Criminal

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

CASES

Civil

Ala., N.	Iowa, S.	N.J.	Pa., W.	Utah
Ala., M.	Kan.	N.Y., E.	P.R.	Vt.
Ariz.	Ky., E.	N.C., E.	S.C., E.	Va., E.
Ark., E.	La., W.	N.C., M.	S.C., W.	Va., W.
Ark., W.	Mass.	N.C., W.	S.D.	Wash., E.
Colo.	Minn.	Ohio, N.	Tenn., E.	Wash., W.
Fla., N.	Miss., N.	Ohio, S.	Tenn., M.	W. Va., N.
Fla., S.	Mo., E.	Okla., N.	Tenn., W.	W. Va., S.
Ga., N.	Mo., W.	Okla., E.	Tex., N.	Wis., E.
Hawaii	Mont.	Okla., W.	Tex., E.	Wyo.
Idaho	Neb.	Ore.	Tex., S.	C.Z.
Iowa, N.	Nev.	Pa., M.	Tex., W.	Guam
				V.I.

MATTERS

Criminal

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

MATTERS

Civil

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

* * *

ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

DISTRICT COURT CASES

Filed

Producers of Phosphate Rock Charged With Violation of Section 1 of Sherman Act. United States v. American Cyanamid Company, et al., (M.D. Fla.). D. J. File No. 60-44-24. In a civil case filed on February 17, 1964, eight producers of phosphate rock, a fertilizer raw material, and two oil companies which have acquired phosphate rock producers were charged with the formation of a combination and conspiracy to exchange information necessary to establish and maintain uniform prices for sales of phosphate rock.

Phosphate rock is the sole source of the phosphate nutrient which is an essential ingredient in fertilizer. Because of ease of access and quality of the ore, Florida sources account for approximately three-fourths of the phosphate rock sold in the United States. Total sales for the United States are about $134,000,000. There are eight producers of phosphate rock in Florida. Each of those producers sells phosphate rock primarily by means of annual contracts which incorporate price-escalation clauses, tying the contract price to the prices of oil and labor, or a price-reopener clause, used to accomplish the same modification. As the costs of oil or labor vary, Florida producers exchange relevant information with competitors. The effect of those exchanges has been to establish uniform increases and decreases in prices of phosphate rock, all such changes having been taken pursuant to the various price-adjustment provisions.

The relief asked included modification of the contracts to eliminate the mechanism of violation and to establish firm prices for sales of the material.

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

Clayton Act - Section 7 Case Filed Against Beer Companies and Temporary Restraining Order Obtained. United States v. Jos. Schlitz Brewing Company, et al., (N.D. Calif.). D. J. File No. 60-0-37. On February 19, 1964, a complaint was filed charging that the proposed stock acquisition by the Jos. Schlitz Brewing Company of Milwaukee of John Labatt, Ltd., of London, Ontario, Canada, which controls the General Brewing Company of San Francisco, was a violation of Section 7 of the Clayton Act. The complaint seeks a preliminary injunction against acquisition by Schlitz of any Labatt stock, and asks that Schlitz be required to divest itself of the Burgermeister Brewing Corporation of San Francisco, which it acquired on December 29, 1961.

The complaint charged that in 1961 Schlitz, including Burgermeister, ranked third in California beer sales with 12.14 percent of the market, according to official state statistics; that General (which until 1963 was called The

Lucky Lager Brewing Company of California) ranked first with 18.36 percent of the market; that at least 49 percent of the stock in General is owned, either directly or indirectly, by John Labatt, Ltd.; and that in 1962 five of the eight directors of General were also directors of Labatt.

On February 8, 1964, Schlitz contracted with members of the Labatt family to buy 750,000 shares of Labatt company stock, and also offered to purchase an additional 750,000 shares from other Labatt shareholders.

The complaint charges that the purchase by Schlitz of the 1,500,000 shares in Labatt would make Schlitz the largest single stockholder in Labatt with 34.7 percent of its common stock; that consummation of this purchase, together with Schlitz' Burgermeister acquisition, could substantially lessen competition and tend to create a monopoly in the sale of beer; and that Schlitz control of General, which markets Lucky Lager beer, may increase Schlitz; advantages over its competitors "to a degree that threatens to be decisive." The complaint asks that the consummation of the Schlitz purchase of Labatt stock be forbidden; that Schlitz be ordered to divest itself of the Burgermeister assets it acquired in 1961; and that General, which is also named as a defendant, be required to operate its business without any direction from Schlitz or from any firm in which Schlitz is a shareholder.

On the morning of February 19, 1964, District Judge George B. Harris in San Francisco signed a temporary restraining order for a period of ten days enjoining Schlitz from acquiring or accepting delivery of any shares in Labatt, from exercising any dominion or control over the stock of Labatt already acquired, and from taking any further action to acquire the stock of Labatt. Judge Harris also enjoined General "from operating under the control of defendant Jos. Schlitz Brewing Company or any other person or corporation in whom the Jos. Schlitz Brewing Company has any substantial interest or control."

On February 20, 1964, counsel for Schlitz and for the United States appeared before Judge Harris. Counsel for Schlitz stated that the First Wisconsin Trust Company of Milwaukee had received a certificate representing 750,000 shares of Labatt stock which was sold to Schlitz by the members of the Labatt family, and that payment had been made for these shares by the Canada Trust Company based on an irrevocable letter of credit from the First Wisconsin National Bank. Schlitz' counsel also stated that 2,600,000 publicly held shares in Labatt had been tendered to Schlitz' Canadian depository and that this depository will accept, on a pro rata basis, 950,000 shares of this tender, by authority of an irrevocable letter of credit. Counsel for Schlitz proposed to the court that certificates representing the Schlitz ownership in Labatt be issued to Schlitz and that the certificates be deposited with and held subject to the jurisdiction of the Court.

On February 24, 1964, the parties again appeared before Judge Harris and agreed to an indefinite extension of the temporary restraining order. Counsel for Schlitz at this time stated that one certificate representing the 750,000 shares in Labatt stock purchased from the Labatt family was on deposit at the First Wisconsin National Bank and the certificate representing the 950,000 shares in Labatt purchased from the public was on deposit with the Bank of

Nova Scotia in Toronto. During this hearing, counsel for General admitted that there was a "long-standing close relationship" between General and Labatt and that General had management arrangements with Labatt.

Staff: Lyle L. Jones, John T. Cusack and Anthony E. Desmond (Antitrust Division)

FILED AND TERMINATED

Complaint and Consent Judgment Filed With Suppliers of Linen in Philadelphia Area. United States v. Philadelphia Association of Linen Suppliers, et al., (E.D. Pa.). D. J. File No. 60-202-34. The complaint in this action was filed on February 26, 1964, charging the Philadelphia Association of Linen Suppliers, 10 corporations, 1 partnership and 8 individuals with violations of Sections 1 and 2 of the Sherman Act. At the same time, a consent judgment was entered successfully terminating the action.

The complaint charges defendants with having engaged in a conspiracy beginning in about 1950 and continuing until June 1959 to restrain, to attempt to monopolize, and to monopolize trade and commerce in furnishing linen supplies to customers in Pennsylvania, southern New Jersey and Delaware. The terms of the alleged conspiracy include refraining from competing for customers, fixing prices for furnishing linen supplies, submitting rigged bids for furnishing linen supplies to public agencies, institutions and hospitals, and impeding other linen suppliers who were not members of the conspiracy in order to exclude such other linen suppliers from the industry or compel them to join the conspiracy.

Defendants named in the complaint and consenting to the judgment terminating the action are:

Anderson's Empire Coat, Apron and Towel Supply, Inc., Atlantic City, N.J.;
Apex Coat-Apron-Towel & Linen Supply Co. Inc., Philadelphia, Pa.;
Atlantic City Coat, Apron, Towel & Linen Supply Co., Inc., Atlantic City, N.J.;
Consolidated Laundries Corporation, New York, N.Y.;
Crown Coat, Apron & Towel Service Co., Philadelphia, Pa.;
Gordon-Davis Linen Supply Company, Philadelphia, Pa.;
Kline's Coat, Apron & Towel Service, Philadelphia, Pa.;
Landy Towel & Linen Service, Inc. of Reading Pa., Reading, Pa.;
Peerless-Union Linen Service, Inc., Philadelphia, Pa.;
Pennsylvania Coat and Apron Supply Company, Philadelphia, Pa.;
Standard Coat, Apron, Towel and Linen Supply, Incorporated, Wilmington, Del.;
Philadelphia Association of Linen Suppliers;
Bernard Citrin, dba The Empire Coat, Apron, Towel and Linen Supply Company, Philadelphia, Pa.;
Jack Feinstein, dba "B" Coat, Apron and Linen Service Company, Philadelphia, Pa.;
Herman Gitlow, Secretary, Gordon-Davis Linen Supply Company;
M. C. Goldberg, President, Pennsylvania Coat and Apron Supply Company, and Anderson's Empire Coat, Apron and Towel Supply, Inc.;

Lewis Landy, Secretary, Treasurer and Manager, Landy Towel & Linen Service, Inc. of Reading, Pa.;
Lawrence Maslow, Vice President, Apex Coat-Apron Towel & Linen Supply Co., Inc.; Atlantic City Coat, Apron, Towel & Linen Supply Co., Inc.; and Standard Coat, Apron, Towel and Linen Supply, Incorporated;
Albert G. Mosler, President, Crown Coat, Apron & Towel Service Co.;
Harry E. Peris, Executive Secretary, Philadelphia Association of Linen Suppliers.

The judgment entered, among other things, enjoins each of the defendants from agreeing with any other linen supplier to fix prices or other terms or conditions for the furnishing of linen supplies; to allocate customers, territories, or markets for the furnishing of linen supplies; to prevent the sale of linen supplies to any linen supplier; to prevent the laundering of linen supplies for any linen suppliers; to prevent any person from being furnished linen supplies by any linen suppliers of his own choice; to impede, injure, obstruct, or harass other linen suppliers, and to submit noncompetitive, collusive, or rigged bids for the furnishing of linen supplies.

The judgment also prohibits defendants from trailing the vehicles and deliverymen of other linen suppliers; in certain instances, from giving below cost prices, cash payments, loans, free services, or other gratuities to obtain linen supply contracts; and from acquiring any other linen supplier for the purpose of reducing, preventing, hindering, or eliminating competition.

It requires defendants to terminate the existence of the Philadelphia Association of Linen Suppliers and to destroy that Association's file of customer registration cards; limits the contract period for linen supply service; and requires each defendant linen supplier to notify its customers of the judgment's provisions in this respect.

Defendants in the action, other than Kline's Coat, Apron & Towel Service, were indicted in 1959 and charged criminally with the same violations as in the instant case. Lawrence C. Kline, Manager of Kline's Coat, Apron & Towel Service, who is now deceased, was named in the criminal case as a defendant. On October 4, 1960, Judge Harold K. Wood, imposed fines totalling $170,500 in the criminal case and, in addition, sentenced most of the corporate and individual defendants to 6 months' probation.

Staff: Donald G. Balthis and John E. Sarbaugh (Antitrust Division)

PENDING

Motion to Dismiss Denied. United States v. Newmont Mining Corporation, et al., (S.D. N.Y.). D. J. File No. 60-0-37-584. On February 11, 1964, Judge Frederick Van Pelt Bryan denied motions by Schneider and Isaacs, two of the four individual defendants, made pursuant to Rule 12(b)1 and 12(b)6, F.R.C.P. to dismiss the complaint on the grounds that, as to them, the Government is not entitled to an adjudication of the matters charged in the complaint or to equitable relief. The Court held that since matters outside the pleadings were presented by affidavit the motions must be treated or disposed of as motions for summary judgment under Rule 56 F.R.C.P. In order to conserve time

the Court disposed of the motion as if it were made under Rule 56.

The Government's complaint in this action charges the corporate defendants all of whom are in the copper industry with stock acquisitions in violation of Section 7 of the Clayton Act, as amended 15 U.S.C. 18, and alleges that all four individual defendants hold interlocking directorships in competing corporations in violation of Section 8 of the Clayton Act, 15 U.S.C. 19. The complaint specifically alleged that defendant Schneider is a director and employee of the defendant Newmont and a director of Pehlps-Dodge and that defendant Isaacs is a director of both Newmont and Phelps-Dodge. The motions by Schneider and Isaacs are based on affidavits stating that they resigned their directorships in Newmont subsequent to the filing of their answers in the action, and making representations that they will not serve again as Newmont directors. They placed their chief reliance on United States v. W. T. Grant Company, 345 U.S. 629 (1953).

In denying the motions the Court held that under the Supreme Court's opinion in the Grant case mere resignation of a directorship does not render an action for violation of Section 8 of the Clayton Act moot. The Court based its dismissal of defendants' motions on the following factors: (1) the alleged violation of Section 8 by defendant corporations in permitting the interlocking directorships; (2) the alleged stock acquisitions by corporate defendants in violation of Section 7; (3) the continuance of Schneider's activities on behalf of Newmont; (4) the firm position taken in the moving defendants' answer as to the legality of their actions; (5) the delay in resigning after commencement of the suit; and (6) the self-serving nature of their disclaimers as to their future intentions.

Staff: Larry L. Williams, Peter A. Donovan, and Leslie S. Mendelsohn (Antitrust Division)

TERMINATED

Fines Imposed For Sherman Act Violation. United States v. Sperry Rand Corporation, et al., (N.D. Ill.). D. J. File No. 60-235-32. Judge Hubert Will has imposed sentences consisting of fines, together with costs, on all twelve defendants after accepting their pleas of nolo contendere coupled with consents to the entry of a judgment of guilty. He accepted the pleas of eleven of the defendants and sentenced them on January 24, 1964; and he accepted the plea of the remaining defendant, Cloyd Gray, and sentenced him on February 7, 1964. The following fines were imposed:

Sperry Rand Corporation	$ 30,000
Art Metal, Inc.	25,000
The Globe-Wernicke Co.	25,000
W. R. Ames Company	10,000
Estey Corporation	17,500
Hamilton Manufacturing Company	12,500
Virginia Metal Products, Inc.	10,000
H. J. Syren	2,500
Cloyd Gray	2,000
F. Philip Tucker	2,000

R. G. Halvorsen	$ 2,000
N. C. Gianakos	1,500
Total	$ 140,000

The fines were less than the amounts recommended to the Court by the Government.

On December 11, 1963, at a conference scheduled for pre-trial purposes, defendants signified their intention of offering pleas of nolo contendere. Judge Will stated that in his opinion a nolo plea does not remove the presumption of defendant's innocence nor relieve the Government of the burden of showing a prima facie case.

Judge Will made two procedures available to defendants. (1) If he accepted a simple nolo plea, he would require the Government to present a prima facie case, during which defendants would stand mute on cross-examination and presentation of evidence but could object to the admissibility of evidence. (2) If defendants filed a nolo plea coupled with consent to the entry of a judgment of guilty, this would obviate the requirement that the Government present a prima facie case.

The Court expressed the opinion that a nolo plea which includes consent to the entry of a judgment of guilty is no different than a plea of guilty and has the same effect.

On January 16 and 17, 1964, defendants all filed petitions for leave to withdraw their pleas of not guilty and substitute therefor their pleas of nolo contendere, each defendant consenting "to the entry of judgment of guilty on the basis of said plea."

At the proceedings on January 24, 1964, the Government, in conformity with a position previously stated at the December conference, opposed the acceptance of nolo pleas offered by six of the defendants (primarily on the ground of repeated violations of antitrust laws by some of these defendants) and offered no objection to the acceptance of nolo pleas of the other six defendants.

Counsel for the Government stated at the hearing that, since the Court's requirement for acceptance of a nolo plea was a novel one and there had been no appellate review establishing the effect of the nolo plea and consent submitted in this case, the Government felt obliged to refrain from equating the plea here with a plea of guilty (as the judge had equated them) and, consequently, on this ground the Government could not withdraw its opposition to the acceptance of nolo pleas tendered by six of the defendants.

Judge Will then repeated for the record the remarks he had made at the pre-trial conference regarding the significance of a nolo plea and his evaluation of the condition attached to it in this case. He said that he does not conceive that a nolo plea "either rebuts the presumption of innocence with which each defendant in a criminal case in our system of jurisprudence stands clothed, nor does it meet the government's burden of establishing the guilt beyond a reasonable doubt."

Ordinarily, the judge stated, he would require, after nolo contendere pleas are entered, that the Government proceed to make out a prima facie case. However, the judge said, in an antitrust case, because of the implications of findings of guilty after receipt of evidence, "I believe this to be an appropriate policy, to accept a plea of nolo contendere coupled with a consent to the entry of a finding of guilty," and he added, "I do not believe that is any different than a guilty plea."

The judge said that he considers the filing of a "nolo contendere plea coupled with the consent to entry of a finding of guilty" to be "nothing but the separation of a guilty plea into two parts." By this plea, in the judge's opinion, "the defendant does waive the presumption of innocence and does waive the government's burden of establishing his guilt beyond a reasonable doubt."

Staff: Earl A. Jinkinson, Francis C. Hoyt and John J. Lannon (Antitrust Division)

Fines Imposed in Fertilizer Case For Sherman Act Violation. United States v. International Ore & Fertilizer Corporation, et al., (S.D. N.Y.). D. J. File No. 60-44-18. On February 20, 1964, Judge Noonan sentenced all defendants in this case on their pleas of nolo contendere accepted by Judge McMahon without opposition of the Government on January 30, 1964. The case involved conspiracy to fix prices and allocate tonnages of triple superphosphate sold to the Republic of Korea and financed by AID. The fines imposed were as follows:

International Ore & Fertilizer Corporation	$ 40,000
Hugh S. Ten Eyck	7,500
Ronald P. Stanton	1,500
Tennessee Corporation	30,000
Edward H. Shelton	2,500
Total	$ 81,500

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

MISCELLANEOUS

Government Succeeds in Quashing Subpoena Duces Tecum Served on Attorney General by Defendants in Private Electrical Damage Cases. City of Burlington, Vermont v. Westinghouse Electric Corp., and Related Cases (D.D.C.). D. J. File No. 60-220-29. Pursuant to the National Discovery Program now being conducted under the supervision of the courts in the many jurisdictions in which the numerous private electrical equipment antitrust damage cases are pending, the electrical manufacturer defendants scheduled the deposition of the Attorney General and served a subpoena duces tecum on January 20, 1964, directing the production of certain documents in connection with the deposition. The subpoena in general called for all documents during a thirteen year period relating to complaints by purchasers of electrical equipment that manufacturers of such equipment were or may have been violating the antitrust laws in the sale of the equipment.

A motion to quash the subpoena was filed by the Government on the principal grounds that (1) the documents requested were protected from disclosure by reason of the informer's privilege, (2) the documents could be obtained from the respective plaintiffs involved in the National Discovery Program, and thus, the subpoena was premature, and (3) that the subpoena was unreasonable and oppressive and would require a burdensome and expensive search through Department files containing hundreds of thousands of documents.

Memoranda of authorities were filed on both sides of the issue. The Government in its memorandum and at oral argument on January 27, 1964, strongly urged that the courts have consistently protected the identity of confidential informants in cases where the Government was a party, and thus, a fortiori, the privilege should be recognized in this proceeding to which the Government was not a party. In particular, it rebutted defendants' argument that the "respected business corporations" involved would not engage in reprisals against known informants. It pointed out that these same companies had been convicted in some of the most mammoth criminal price-fixing conspiracies in history, had the power to retaliate against smaller plaintiffs and individuals involved, and might be so inclined in light of the enormous potential damage liabilities facing the manufacturers. It further pointed out the adverse effect on law enforcement if the privilege were denied. In addition, the Government filed affidavits in support of its argument on the burdensomeness of the subpoena request.

On February 14, 1964, Judge John J. Sirica entered an order quashing the subpoena duces tecum without opinion, his order, however, providing that: "the Court [has] concluded that the documents in question are protected by the informers' privilege asserted by the Attorney General, and the Court [has] further concluded that the subpoena is burdensome and oppressive."

Staff: H. Robert Halper (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

LONGSHOREMEN'S AND HARBOR WORKERS COMPENSATION ACT

Mental Disability Arising Out of And in Course of Employment Unrelated to Physical Trauma Held Compensable Under Longshoremen's Act. American National Red Cross and The Travelers Insurance Company v. Hagen, et al. (C.A. 7, February 4, 1964). In this action an employer and its insurance carrier challenged the Deputy Commissioner's finding that claimant had suffered a compensable injury within the meaning of 33 U.S.C. 902(2) and that the injury arose out of and in the course of his employment. Claimant, an assistant field director employed by the American National Red Cross, and assigned to overseas duty with the troops, was found to be suffering an acute schizophrenic reaction as a result of employment stresses to which he had been subjected. The district court found that such a disability was cognizable as a compensable injury. In addition, the court found the Deputy Commissioner's finding that the condition was employment-precipitated to be supported by substantial evidence. The Court of Appeals affirmed. Relying on the statutory presumption of coverage (33 U.S.C. 920), the Court agreed that mental disabilities were intended to be afforded coverage. The case is significant in that it represents the first reported decision considering the compensability, under the Longshoremen's Act, of mental disability unrelated to physical trauma.

Staff: Edward Berlin (Civil Division)

PARTIES

Mandamus Will Not Issue to Compel District Court to Join United States as "Necessary" Party Pursuant to Rule 19(b), F.R. Civ. P.; Such Joinder Discretionary With District Court, And No Abuse of Discretion Shown Here. General Tire & Rubber Co. v. Watkins (C.A. 4, January 7, 1964). This litigation, between private parties, involves the validity and infringement of patents allegedly acquired pursuant to Government research contracts. After an earlier unsuccessful attempt to maintain a separate infringement action against the Government, both in its own right and as representative of all those claiming license by reason of Government research contracts, General Tire sought to join the United States as a "necessary" party to this action, pursuant to Rule 19(b), F.R. Civ. P., claiming that complete relief could not otherwise be accorded the parties. The district court denied the motion and in the subsequent mandamus proceeding in the Fourth Circuit we joined in defending Judge Watkins' order. We argued (1) that the matter was not appropriate for review on mandamus because Rule 19(b) vests the district court with discretion as to whether a party is "necessary" (i.e., whether its presence is essential to the awarding of complete relief), and (2) that, in any event, Judge Watkins had correctly decided that complete relief could be accorded the parties without joining the United States.

The Court of Appeals denied the mandamus petition, holding that a Rule 19(b) motion is essentially discretionary with the district court, and that there had been no showing that this discretion had been abused here. This decision virtually assures that the Government will not be forced into this exceedingly lengthy and complex litigation.

Staff: Stephen Swartz (Civil Division)

TORT CLAIMS ACT

Government Not Liable For Negligence in Waxing Floor Upon Which Tap Dancer Performed, Where No Government Employee Had Reason to Know That Such Condition Was Dangerous or That Tap-dancing Act Was to Take Place. Leslie Eisenhower v. United States (C.A. 2, January 31, 1964). Plaintiff brought this suit for damages for personal injuries sustained from a fall while performing an acrobatic tap dance routine at the United States Navy Receiving Station in Brooklyn. Plaintiff was part of a troop which was about to proceed overseas to entertain the troops abroad. The floor on which the injury took place had been newly waxed earlier that day--a condition dangerous for such dancing. The Government raised defenses of assumption of the risk and contributory negligence. The district court gave judgment for the Government. In affirming, the Court of Appeals noted that there had been no negligence on the part of the Government since none of its employees knew (1) that the dancing would take place or (2) that new wax was dangerous for such an act. Moreover, the Court noted, plaintiff, who knew of the danger, had not taken any steps to have the wax taken off and had proceeded with her dance without asking to be relieved and without taking any precautions--such as wearing special shoes--to prevent the accident.

Staff: United States Attorney Joseph P. Hoey and Assistant United States Attorney Carl Golden (E.D. N.Y.)

Damage Award Inadequate; No Evidence That Plaintiff Received Gratification From Pain and Suffering; Rule of Law Which Would Take Such Factor Into Account Is Improper. Catherine Thomas v. United States (C.A. 7, January 27, 1964). Plaintiff was injured in a collision involving an automobile in which she was riding and the Government's negligently driven mail truck. The court found that plaintiff, as a result of the Government's negligence, suffered a cerebral concussion, contusion to the soft parts of the neck, and post concussion shock. The court further found that the accident resulted in the arousing of plaintiff's dormant psychoneurosis. As a result of this mental condition, plaintiff was found to have received gratification from her injuries and was awarded nominal damages of $100 for pain and suffering, in addition to $11,221.20 medical expenses and loss of earnings.

The Court of Appeals reversed, ordering that a pain and suffering award be entered so as to increase the judgment to $18,500. The reversal was based on alternative grounds: (1) there was no evidence that plaintiff received gratification or enjoyment from the pain and suffering, and thus the district

court's finding to this effect was clearly erroneous; and (2) a rule of law which takes into account the secondary effect of plaintiff's injuries such as psychological gratification and deducts such mental gratification from the physical pain and suffering to arrive at a net quantity of pain is an improper one. The reasoning behind the Court of Appeals' second holding was that, until man has arrived at a more exact science of human pain and suffering, the secondary effects of physical injuries cannot be ascertained with any accuracy.

Staff: United States Attorney Frank E. McDonald; Assistant United States Attorneys John P. Lulinski, John P. Cronky and Barry J. Freeman (N.D. Ill.)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

MAIL FRAUD

Sale of Fractional Interests in Uranium Deposit Land; Lulling Letters Part of Scheme to Defraud. Beasley v. United States (C.A. 10, February 11, 1964). Appellant was convicted for violations of 18 U.S.C. 1341 arising out of the sale of fractional interests in land represented to contain valuable uranium deposits. It was established that he knew his title to the land was doubtful and that the existence of uranium deposits was not shown by reliable exploratory operations. He received a sentence of five years on each of ten counts, the terms to run concurrently.

On appeal, appellant contended that the mailings were not for the purpose of executing the scheme to defraud, since they occurred after the victims had parted with their money. He relied on Kann v. United States, 323 U.S. 88, and Parr v. United States, 363 U.S. 370. The letters assured the purchasers that they would suffer no loss and that appellant would perform his promised services. Appellant subsequently continued his efforts to obtain more money by the use of the scheme. In affirming the conviction, the Court of Appeals for the Tenth Circuit stated that these lulling letters were a part of the scheme to defraud, citing United States v. Sampson, 371 U.S. 75, 80-81.

Staff: United States Attorney John Quinn; Assistant United States Attorney John A. Babington (D.N. Mexico).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Alien Not Deportable for Conviction of Crimes if Convicted When Naturalized Citizen. Frank Costello v. INS (S.Ct. No. 83, February 17, 1964.) By a 6-2 decision the Supreme Court ruled petitioner, Frank Costello, not deportable because of his two convictions in 1954 for income tax evasion. The precise question before the Court was whether the provision of Section 241(a)(4) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(4), that an alien shall be deported "who . . . at any time after entry is convicted of two crimes involving moral turpitude . . ." applies to a person who was a naturalized citizen at the time of conviction of the two crimes, but was later denaturalized. The Second Circuit resolved the question in the affirmative, finding no ambiguity in the language of Section 241(a)(4), and support for its ruling in Eichenlaub v. Shaughnessy, 338 U.S. 521. In Eichenlaub the Supreme Court held that under a 1920 deportation law aliens who had been convicted of specified offenses were deportable even though they were naturalized citizens when convicted.

The Supreme Court differed with the Second Circuit finding an ambiguity in the provisions of Section 241(a)(4). Eichenlaub was distinguished on the basis that the language of the deportation statute interpreted in that case unambiguously authorized deportation regardless of the alien's status at time of conviction. The Court agreed that Section 241(a)(4) could be interpreted to permit deportation only of a person who was an alien at time of his convictions as contended by Costello, or, as urged by the Government, to permit deportation of an alien who had been convicted of two crimes regardless of his status at the time of his convictions. After concluding that the legislative history of the statute did not illumine its problem, the Court found considerable light from another provision of the same statute. Section 241(b)(2) provides that deportation under Section 241(a)(4) shall not take place if the court sentencing the alien recommends to the Attorney General that the alien be not deported. The Court felt that if Section 241(a)(4) were construed to apply to those convicted when they were naturalized citizens, the protective provision of Section 241(b)(2) would as to them become a dead letter. Until denaturalized, the convicted person would be a citizen for all purposes and the sentencing court would lack jurisdiction to make the recommendation provided by Section 241(b)(2). The Court stated that if despite the impact of Section 241(b)(2) it should still be thought that the language of the statute and the absence of legislative history continued to leave the matter in some doubt, the Court would nonetheless be constrained to resolve the doubt in Costello's favor in accordance with accepted principles of construction of deportation statutes enunciated in Delgadillo v. Carmichael, 332 U.S. 388, and Fong Haw Tan v. Phelan, 333 U.S. 6.

The Government had also urged that petitioner was legally an alien when convicted in 1954 because Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. 1451(a), under which Costello's 1925 naturalization was cancelled in 1959 provides that an order of denaturalization shall be effective as of the original date of the naturalization order. The Court rejected this argument stating that in the absence of specific legislative history to the contrary they were unwilling to attribute to Congress a purpose to extend the Government's relation-back theory-termed by them a legal fiction-to the deportation provisions of Section 241(a)(4). The Court further said that if Congress had wanted the relation-back doctrine of Section 340(a) to apply to the deportation provision of Section 241(a)(4) and thus to render nugatory and meaningless for an entire class of aliens the protection of Section 241(b)(2), Congress could easily have said so.

Justice White wrote a dissent, in which Justice Clark concurred. He pointed out that the provision of Section 241(a)(4) fit Costello exactly and unambiguously, since he is an alien who at any time after entry is convicted of two crimes. Justice White found that the majority's holding has an anomalous result in that the alien who has not become a citizen is deportable for the commission of two crimes, but not so the alien who has committed two crimes and has also been denaturalized for fraud practiced in procuring his citizenship. The alien's fraud, said Justice White, becomes his ready and protective shield, a result which he could not believe Congress intended to enact into law.

Staff: Archibald Cox, Solicitor General; Herbert J. Miller, Jr., Assistant Attorney General, Criminal Division; Wayne G. Barnett and Stephen J. Pollak, Assistants to the Solicitor General; Beatrice Rosenberg and Don R. Bennett (Criminal Division)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Immigration and Nationality Act - Travel Without a Passport (8 U.S.C. 1185(b)) D.J. File No. 146-1-51-4967. United States v. William Worthy, Jr. (C.A. 5). Appellant was tried on a one count indictment which charged that he entered the United States from Havana, Cuba without a valid passport in violation of 8 U.S.C. 1185(b). This was the first case tried under this section of the statute.

On appeal, appellant contended, inter alia, that the Act was unconstitutional because it violated his right to travel, his rights under the First Amendment, that it violated due process and was void because of vagueness of the statute, and that it was also unconstitutional in that it violated his rights to expatriation, and constituted banishment. The Court of Appeals reversed his conviction. In so doing they found against appellant on every constitutional issue except the question as to whether or not the statute constituted banishment. On this point the Court held that 1185(b) describes two separate offenses, that is, illegal departure and illegal entry and that only the latter offense, that is, illegal entry, was before the Court. The Court then interpreted this branch of the statute as imposing criminal penalty on an individual who seeks to exercise his constitutional right to return to this country and thus forces the citizen to choose between banishment and expatriation on the one hand or entering the country on the other hand, being faced with criminal punishment, and concluded that the Government cannot constitutionally say to a citizen standing beyond the country's borders that re-entry is a criminal offense.

Staff: Robert L. Keuch, Internal Security, argued the appeal. With him on the brief were Kevin T. Maroney and Carol M. Burke (Internal Security).

Internal Security Act of 1950, Passport (50 U.S.C. 785(a)(2)). United States v. Hyman Seigel (E.D. N.Y.) D.J. File No. 146-1-11-296. On February 13, 1964 a Federal grand jury returned a one-count indictment against Hyman Seigel charging a violation of 50 U.S.C. 785(a)(2). This section 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 "use" a United States passport. The indictment charges that Seigel used his passport to effect his re-entry into the United States at the New York International Airport upon his return from a trip to Russia and other European countries.

This case is the first prosecution under the sanction prohibiting Communist Party members from using passports. A similar case, United States v. Zena Druckman, which involves the prohibition against a Communist Party member applying for a passport, is currently pending in the Northern District of California.

Seigel has been released on $500 bail pending a removal hearing to be held in the Northern District of California.

Staff: Brandon Alvey and David H. Hopkins, Jr. (Internal Security Division)

Communist Political Propaganda. Amlin v. Shaw, et al. (S.D. Cal.) D.J. File No. 145-5-2539. By reason of the provisions of 39 U.S.C. 4008, unsealed mail matter which is determined by the Secretary of the Treasury to be "communist political propaganda" must be detained by the Postmaster General on its arrival from abroad for delivery in the United States [or upon its subsequent deposit in the domestic mail], and he must notify the addressee that such matter has been received and will be delivered only upon the addressee's request. The statute contains the exception, however, that no detention is required in the case of any subscription mail or any mail "which is otherwise ascertained by the Postmaster General to be desired by the addressee".

Plaintiff was notified, pursuant to this statute, that he was an addressee of unsealed "communist political propaganda", and was requested to advise the Post Office Department if he did or did not desire delivery of this mail. Rather than answer the inquiry, plaintiff filed suit on May 31, 1963, demanding that this mail and all other such mail be delivered to him; and that 39 U.S.C. 4008 be declared unconstitutional by a three-judge district court and its enforcement enjoined. The Post Office Department viewed the demands contained in the complaint as a request for delivery of the mail, and forwarded it to plaintiff, pursuant to the above quoted provisions of the statute. The Post Office Department also advised plaintiff that he would receive all future "communist political propaganda" addressed to him without further inquiry. Thereupon, plaintiff filed a supplemental complaint demanding that the Post Office Department be enjoined from maintaining his name in an index of addressees who desired delivery of propaganda material.

In his supplemental complaint, plaintiff also alleged that he desired to send foreign "communist political propaganda" through the domestic mail and he wished the Court to enjoin any possible "interference" with said mail by the Post Office Department under the provisions of 39 U.S.C. 4008.

The matter came before the Court on the Government's motion to dismiss. The Court ruled that when a three-judge district court is requested, it is the duty of the District Judge to pass on the sufficiency of the complaint both as to whether or not a justiciable controversy is present, and as to whether or not a constitutional question is involved. The Court then concluded that the complaint did not present a justiciable case or controversy under Clause 2, Article III of the Constitution, nor did it present a substantial constitutional question.

The Court, observing that plaintiff really sought an advisory opinion as to the constitutionality of 39 U.S.C. 4008, entered its judgment of dismissal on February 13, 1964.

Staff: United States Attorney Francis C. Whelan and Assistant United States Attorney Dzintra I. Janavs (S.D. Cal.); Benjamin C. Flannagan (Internal Security Division)

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.) D.J. File No. 146-7-5320. On September 20, 1963, six present and past officers of the International Union of Mine, Mill and Smelter Workers were convicted by a Federal jury in Denver, Colorado, of conspiracy to defraud the Government by the illegal use of the facilities of the National Labor Relations Board by filing false non-Communist affidavits between 1949 and 1956. (See U.S. Attorney's Bull. Vol. 11, No. 20, October 18, 1963). On November 7, 1963, each defendant was sentenced to three years' imprisonment and fined $2,000 (U.S. Attorney's Bull. Vol. 11, No. 23, November 29, 1963). Defendants Albert Pezzati and Graham Dolan who, in October 1959, had entered pleas of nolo contendere, were, on February 24, 1964, placed on probation by Chief Judge Alfred J. Arraj for a period of three years.

Staff: United States Attorney Lawrence M. Henry and Assistant United States Attorney Donald MacDonald (D. Col.); Lafayette E. Broome, F. Kirk Maddrix, and Francis X. Worthington (Internal Security Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Federal Tax Liens: Federal Tax Lien Is Senior to Material Lien Not Reduced to Judgment at Time Tax Lien Arose; State Is Not Judgment Creditor Under Section 6323 of 1954 Code; Method of Distribution. United States v. Frank E. McGehee (Sup. Ct. of Ark., February 17, 1964) D.J. No. 5-10-142. In a foreclosure suit, the fund available for distribution was inadequate to pay the claims of three material and labor lienors, a mortgagee, the Arkansas Commissioner of Revenues (by virtue of a state tax lien), and the United States (holder of three federal tax liens). The lower court determined their relative priorities and entered judgment accordingly. It ranked the material and labor liens according to the dates on which the work or material was supplied and the remaining claimants according to the date on which their lien or mortgage was filed. It held that the State of Arkansas was a judgment creditor within the meaning of Section 6323 of the 1954 Code, because, under Arkansas law, the state certificate of tax indebtedness, when filed with the circuit clerk and entered upon the judgment roll, was given the same effect as a judgment rendered by the circuit court. Accordingly, the lower court ranked the state and federal tax liens according to the dates on which they were recorded.

On appeal, the Arkansas Supreme Court reversed on both points. It held that none of the material and labor liens were choate, i.e., had been reduced to judgment or definitely established in amount, at the time the federal tax liens arose, relying upon United States v. Pioneer American Ins. Co., 374 U.S. 84 (attorney's fee); United States v. Colota, 350 U.S. 808; United States v. White Bear Brewing Co., 350 U.S. 1010; United States v. Vorreiter, 355 U.S. 15; United States v. Hulley, 358 U.S. 66. While the last four decisions had reversed lower court decisions holding that material and labor liens which had not been reduced to judgment at the time the federal tax liens arose were senior to the tax liens, all of the reversals were by per curiam decision, without discussion of the rationale. The Court also held that the State was not a judgment creditor within the meaning of Section 6323 because it was not the holder of a judgment of a court of record, relying upon United States v. Gilbert Associates, 345 U.S. 361.

The Court remanded the case to the lower court with express directions concerning the manner of disposition of the fund among the several claimants. The method of distribution used is that announced in United States v. New Britain, 347 U.S. 81 and United States v. Buffalo Sav. Bank, 371 U.S. 228.

Staff: Joseph Kovner, J. Edward Shillingburg (Tax Division)

District Court Decision

Withholding From Wages: Completing Surety Held to Be "Employer" Liable for Withholding and Federal Insurance Contributions Act Taxes During Period It

Was in Control. National Surety Corporation v. United States. (D. Kans., December 30, 1963). (CCH 64-1 USTC ¶9197). Upon the default of three electrical work contracts entered into by the contractor, Eaton Electrical Company, the National Surety Corporation undertook the completion of the said contracts under its performance bond and hired Jack Eaton, the defaulting contractor, as an employee to supervise the completion of the contracts. The surety set up a special working fund to pay the salaries of all the employees on the three jobs and to pay the salary and expenses of Jack Eaton. All checks were required to be signed by Jack Eaton and countersigned by one of two employees of the surety.

The Court found that the surety had control over the employees, the payment of their wages, and their performance of the contracts, and that the surety had the right to discharge either Jack Eaton or any of the other employees and that the said employees recognized this right in the surety. The Court thereby concluded that the surety company had such control over the completion of the electrical work contracts as to be an "employer" as defined by Section 3401(d) and 3121(d)(2) of the Internal Revenue Code of 1954, thereby making the surety liable for withholding and federal insurance contributions act taxes for the period over which it had control.

Staff: United States Attorney Newell A. George and Assistant United States Attorney Robert M. Green (D. Kans.)

State Court Decision

Priority of Federal Tax Lien; Competing Claim of Assignee in Taxpayer's Property Not Entitled to Priority Where Assignment Became Effective Subsequent to Filing of Notice of Tax Lien. Washington Construction Company, Inc., v. United States, et al. (Superior Court, Passaic County, New Jersey) D. J. No. 5-98-4955. Washington Contruction Company filed an interpleader action wherein it admitted owing $3,928.35 to the taxpayer, Gregmor Construction Company. The United States acquired tax liens on taxpayer's property rights as a result of assessments made on May 20, 1960, and August 12, 1960. These tax liabilities together exceeded the amount of the interpleaded funds.

A notice of tax lien was filed by the Government on October 28, 1960, in Bergen County, New Jersey, domicile and principal place of business of taxpayer Gregmor. The competing claimant, Harrison Supply Company, asserted priority based on an assignment of $2,000 of the interpleaded fund. The assignment was made known to Washington Construction in a letter from the taxpayer, dated October 31, 1960.

On November 14, 1963, the Court filed an opinion wherein it ruled against the Government's claim of priority. (64-1 USTC ¶9159). The Court confused the stakeholder with the taxpayer. Because it believed that Washington Construction was the taxpayer, it held that the notice of liens was improperly filed in Bergen County and that it should have been filed in Passaic County (the domicile and principal place of business of Washington Construction) to be effective against Harrison's assignment claim. The Court found that Harrison was a purchaser within the meaning of Section 6323 of the Internal Revenue Code of 1954 and was thus protected by the Government's failure to file notice of tax liens in the proper county. The Court concluded that Harrison was a purchaser on the ground that it was the "intention of the parties *** that Harrison was to

relinquish its claim against Gregmor in return for the assignment of Washington's debt to Gregmor."

Thereafter the United States Attorney notified the Court that Washington was the stakeholder and not the taxpayer. In a letter opinion, dated December 16, 1963, the Court acknowledged its error in misconstruing the identity of the parties. It ruled that the notice of tax liens was properly filed in Bergen County (October 28, 1960) prior to the effective date of the assignment (October 31, 1960). Consequently, the federal tax liens were entitled to priority over the assignment.

In view of the Court's decision, it became academic as to whether Harrison was a purchaser. Nevertheless, the Court reconsidered its earlier finding and determined that Harrison was not a purchaser for a present valuable consideration (as required by Section 6323) because Harrison "did not intend to relinquish its claim against Gregmor in return for the assignment of Washington's debt to Gregmor" as was evidenced by the fact that Harrison had instituted a suit at law "against Gregmor and Washington for the original debt owed to Harrison by Gregmor and the $2,000 alleged assignment of Washington's debt to Gregmor."

Staff: United States Attorney David M. Satz, Jr., and Assistant United States Attorney Martin Tuman (New Jersey) Louis J. Lombardo (Tax Division)

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