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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick

SHERMAN ACT

Supreme Court Rules For Government in Bank Case. United States v. First National Bank and Trust Co. of Lexington, et al. D.J. File 60-11-148. On April 6, 1964, the Supreme Court reversed the District Court for the Eastern District of Kentucky and held that the merger of two commercial banks, which together accounted for approximately 52% of commercial bank business in Fayette County, Kentucky, violated Section 1 of the Sherman Act. In an opinion by Mr. Justice Douglas, the Court relied upon the railroad merger cases "for the proposition that where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger, itself constitutes a violation of §1 of the Sherman Act." The Court found the market shares of the merging banks sufficient to satisfy this standard.

The case arose out of the consolidation, on March 1, 1961, of the First National Bank and Trust Co. (First National), and Security Trust Co. (Security Trust), both of Lexington, Kentucky. (This consolidation was approved by the Comptroller of the Currency although the Federal Deposit Insurance Corp., the Board of Governors of the Federal Reserve System, and the Justice Department had recommended against it upon antitrust grounds.) On the day of the consolidation, the Government attacked it in a civil suit, alleging violations of Sections 1 and 2 of the Sherman Act. Efforts to stay further execution of the consolidation were unsuccessful; however, the District Court did order the merging banks to maintain separate books and records during the pendency of the suit. Trial was held in February, 1962 and on July 30, 1962, the District Court, per H. Church Ford, J., dismissed the complaint, finding no violation of the Sherman Act resulting from the merger.

Before the Supreme Court, the Government argued that the merger violated Section 1 of the Sherman Act by unreasonably restraining trade in commercial banking in Fayette County, Kentucky, a market found by the District Court and not disputed by appellees upon appeal. (The Government also asserted a violation of Section 2 in this market, acknowledging, however, that the Court was not compelled to so find in order to dispose of the case.) Finally, the Government argued that the consolidation violated Section 2 in corporate trust department services in Fayette County, a market rejected sub silentio by the District Court and denied by appellees upon appeal.

The Supreme Court found that the merger violated Section 1 in commercial banking in Fayette County. Mr. Justice Douglas' opinion noted that prior to merger, First National was the largest bank in the county with approximately 40% of the business, and Security Trust was fourth largest with approximately 12%. Thus, the merger created a bank larger than the four remaining banks combined:

	Assets	Deposits	Loans
First Security	52.70%	51.95%	54.20%
Citizens Union	17.06	16.78	16.41
Bank of Commerce	12.99	13.32	14.46
Central Bank	9.14	9.66	8.85
Second National	8.10	8.30	6.09

The Court also observed that the merging banks had been "close competitors" in corporate trust department services, sharing 94.82% of all trust assets, 92.20% of all trust department earnings, and 79.62% of all trust accounts held by corporate fiduciaries in the county.

Although recognizing the absence of any predatory purpose, the Court found the competition eliminated by the merger to be "significant". It cited the testimony of officials of three of the four remaining county banks that the merger will seriously affect their long range ability to compete effectively; "that the 'image' of 'bigness' is a powerful attraction to customers, an advantage that increases progressively with disparity in size; and that the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition there."

The elimination of such "significant competition" between the merging banks was found to constitute an unreasonable restraint of trade, in violation of §1 of the Sherman Act, upon the authority of the railroad merger cases: Northern Securities Co. v. United States, 193 U.S. 197 (1904); United States v. Union Pacific R. Co., 226 U.S. 61 (1912); United States v. Reading Co., 253 U.S. 26 (1920); and United States v. Southern Pacific Co., 259 U.S. 214 (1922). These cases, the Court concluded, "at least stand for the proposition that where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger, itself constitutes a violation of §1 of the Sherman Act. That standard was met in the present case in view of the fact that the two banks in question had such a large share of the relevant market."

In a response to the dissenting opinion, which argued that United States v. Columbia Steel, 334 U.S. 495 (1948), rejected the railroad cases, the Court stated that "Columbia Steel . . . must be confined to its special facts." It noted that the merging companies in that case could not compete effectively in the same geographic market because of plant locations and freight rates. Moreover, the Court stated, all the factors enumerated in Columbia Steel indicate a Sherman Act violation in this case.

Mr. Justice Brennan and Mr. Justice White concurred in the decision for reversal, finding a violation of Section 1 solely on the basis of Columbia Steel standards which, they found, "clearly compel the reversal."

Mr. Justice Harlan and Mr. Justice Stewart dissented on the grounds that the railroad cases were rejected as Sherman Act authority in Columbia Steel and that by Columbia Steel standards this merger does not violate the Sherman Act.

Staff: Robert B. Hummel, Larry L. Williams, Melvin Spaeth, and Richard J. Wertheimer. (Antitrust Division)

Defendant in Antitrust Case Not Entitled to Immunity. United States v. William C. Welden (formerly H. P. Hood & Sons, Inc., et al.) Appellees (Supreme Court). Welden and others were indicted on charges of conspiring to fix milk prices and to defraud the United States, in violation of the Sherman Act, 15 U.S.C. 1, and the Conspiracy Act, 18 U.S.C. 371. The District Court for the District of Massachusetts dismissed the indictment as to Welden on the ground that he had obtained immunity from prosecution under the immunity provision of the Act of February 25, 1903, 15 U.S.C. 32 (more familiarly known as the antitrust immunity statute) because he had previously testified before a Congressional committee concerning matters covered by the indictment.

On April 20, 1964, the Supreme Court reversed, holding that Welden was not entitled to immunity for the testimony he gave before the Congressional committee, even though it may have related to matters covered by the indictment, because the antitrust immunity statute applies only to testimony given in judicial proceedings, not to hearings before Congressional committees.

Mr. Justices Bland and Douglas dissented, each writing a separate dissenting opinion.

Staff: Robert B. Hummel and Irwin A. Seibel (Antitrust Division)

CLAYTON ACT

Section 7 Of Clayton Act Filed Against Oil Company. United States v. Standard Oil Company (New Jersey), et al. (S.D. Calif.) D.J. File 60-0-37-750. This civil suit, filed on April 14 to block the Humble Oil Company's $329,000,000 acquisition of the western operations of the Tidewater Oil Company, charged that the acquisition would eliminate actual and potential competition in the sale of gasoline and other petroleum products, in violation of the Celler-Kefauver anti-merger section of the Clayton Act. Named as defendants were Humble, with headquarters in Houston; Tidewater, with headquarters in Los Angeles; and the Standard Oil Company of New Jersey, with headquarters in New York City, Humble's parent company and the largest industrial corporation in the country.

The complaint asked that an acquisition agreement reached last November 22, 1963 between Humble and Tidewater, to become effective April 30, be declared unlawful and that, pending trial, it be blocked by a preliminary injunction. Under the agreement, Humble would acquire virtually all of the marketing, manufacturing and transportation assets of Tidewater's western division, covering Washington, Oregon, California, Nevada, Arizona, Idaho, Utah, and Hawaii for $329,000,000. The suit also asked that Humble be ordered to divest itself of the Monterey Oil Company, a substantial independent producer of crude oil and natural gas in California, which it acquired in February, 1961. At present, Humble accounts for approximately a third of Standard of New Jersey's earnings. Jersey's assets and sales in 1962 each exceeded $11,000,000. Humble, the complaint said, ranks first among American petroleum companies in oil and gas reserves and in sales of gasoline and other refined petroleum products. The complaint said Tidewater is approximately 12th among American petroleum firms, with assets of $969,000,000 and sales of

$657,000,000 in 1962. It operates in several states, but principally on the east and west coasts.

Although Humble has only recently entered the field of marketing gasoline and other refinery products in the West, it already is a substantial competitor of Tidewater, the complaint said. In Washington, Oregon, California, Nevada, and Arizona, for example, Humble sold 129,000,000 gallons of gasoline worth nearly $20,000,000 in 1962, according to the suit. Tidewater sold 781,000,000 gallons worth $120,170,000 in the area in 1962.

In addition to eliminating this growing competition in gasoline sales, the complaint said the acquisition would eliminate Tidewater as a gasoline supplier for a number of independent marketers called "rebranders"; would substantially increase concentration in the production of crude oil; and would eliminate substantial competition in other areas of the petroleum business.

A motion for preliminary injunction and supporting affidavits were filed on April 15th, and hearing on the motion before a 3-judge expediting court is tentatively set for April 27th.

Staff: Stanley Disney, John Waters and David Melincoff. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

BANKRUPTCY

A District Court Sitting in Reorganization Proceedings Is Without Power to Require Summary Turnover of Contract Monies in Possession of Government and Held on Claim of Right of Setoff. United States v. Eugene W. Owens, Trustee in Bankruptcy (C.A. 5, March 16, 1964). In reorganization proceedings involving former Government contractors, the debtors' trustee filed a petition in the district court seeking a determination of the rights of the United States and others to contract monies held by the Department of the Army on the Government's claim of right to setoff against liens. The Government's motion to dismiss on the ground that the court had no jurisdiction, either summary or plenary, was denied. The district court proceeded to determine rights to, and distribution of, the funds in question. It allowed the Government's claim of setoff in part, charged that part with a portion of administration expenses and attorney's fees, and ordered turnover of the balance.

The Court of Appeals reversed, deciding the case on the jurisdictional issue. The Court held that property or funds held in possession by third parties are not subject to a summary turnover order by the bankruptcy court unless it "clearly appears that possession was in or for the bankrupt and the adverse claim or right is only colorable." The Court of Appeals found it unnecessary to decide the Government's further jurisdictional contention that the reorganization court also had no jurisdiction in this matter as it was a contract matter involving more than $10,000 and therefore within the exclusive jurisdiction of the Court of Claims.

The case is important in curbing the attempts of bankruptcy courts to deal with such funds summarily as within the courts' jurisdiction, and therefore also subject to payment of a part of the reorganization expenses.

Staff: Kathryn H. Baldwin (Civil Division)
Joseph Kovner and Karl Schneidler (Tax Division)

CONFLICT OF INTEREST

Government Entitled to Recover Salary Received by Federal Inspector From Private Employer Whose Companies Inspector was Assigned to Inspect For Government. United States v. Drumm (C.A. 1, March 23, 1964). The Government brought this civil action against a former poultry inspector employed by the Department of Agriculture. It sought an accounting and recovery of salary paid to the inspector for private consultant work done on week-ends and evenings. Defendant's private employer owned a controlling interest in the poultry plants whose processes defendant was assigned to inspect on a full-time basis for the Department of Agriculture. There was evidence that defendant was aware of the relationship between these companies and his private employer. The consultant work

related directly to matters which defendant was assigned to inspect and evaluate for the Department of Agriculture.

Over the five-year period involved, defendant earned more from his consultant work than from his full-time Government job. There was no evidence, however, that defendant actually passed bad poultry, was otherwise influenced in enforcing the federal sanitary regulations, or that the consultant work was not worth what defendant was paid for it.

The district court directed a verdict for defendant at the close of the Government's case and the Court of Appeals reversed. The appellate court held that, as a full-time employee of the Government, defendant owed a duty of fidelity that a jury could conclude was breached by acceptance of a salary from a private employer whom he was advising on matters which he was assigned to inspect for the Government. The court said that defendant's consultant job "certainly compromised to a great extent his position as an impartial poultry inspector and his usefulness to the government."

Although defendant's conduct had also violated a Department rule forbidding outside employment without consent, the Court did not rely on this rule in its discussion of liability. The Court further held that, recovery was not barred by lack of evidence that bad poultry was passed or that defendant had damaged the reputation of the poultry inspection program. Finally, the court relied on United States v. Carter, 217 U.S. 286, and on general agency law, to sustain the civil recovery which the Government sought. In remanding the case, the Court noted that the trial judge had displayed "marked prejudice" against the Government and directed that any new trial be held before another judge.

Staff: Robert V. Zener (Civil Division)

FEDERAL TORT CLAIMS ACT - MALPRACTICE

Duty of Government Doctor at Veterans Hospital Ends When Patient Is Safely Delivered to Another Hospital. Murray v. United States (C.A. 4, March 9, 1964). This action was based on a claim of negligence of a Government doctor. A veteran, brought to a V.A. hospital in an agitated and alcoholic state, was given 5 cc's of paraldehyde by a V.A. doctor. This was a proper dosage of a mild sedative commonly prescribed in such situations. When the patient became semi-comatose, the V.A. doctor transferred him to a private hospital. The doctor at the private hospital, who was aware that the paraldehyde had been administered, examined the patient. He then advised the Government doctor by telephone that the patient, still in a semi-comatose state, would be turned over to the police. The Government doctor gave no further advice or assistance. Shortly after he was turned over to the police, the patient started to vomit. The police returned him to the private hospital, where he was received dead on arrival. The death was caused by choking on vomitus incident to acute alcoholism.

The district court found that the V.A. doctor was not negligent in declining to admit the patient, in administering paraldehyde, in sending him to the second hospital or in reporting to the second doctor what had been done to the patient at the V.A. hospital. However, the district court held as a matter of law that the V.A. doctor had a duty either to protest the proposed transfer to the police and to insist that the patient be kept under medical observation at the second hospital, or to bring the patient back to the V.A. hospital for further supervision. The lower court reasoned that, since the V.A. doctor had induced the patient's semi-comatose state by administering a drug, the doctor was under a duty to continue supervision of the patient until he regained consciousness. The Court of Appeals reversed, holding that the V.A. doctor's duty went no further than "a careful and safe delivery of the patient into competent hands."

Staff: Pauline B. Heller (Civil Division)

LONGSHOREMEN'S AND HARBORWORKERS' COMPENSATION ACT

Compensation Scheme Prescribed in Longshoremen's Act Not Unconstitutional; District Court Properly Rejected Application for Three-Judge Court. Flamm v. Hughes, et al., (C.A. 2, March 20, 1964). In 33 U.S.C. 908(c), the Longshoremen's Act provides a specific schedule of benefits to be paid for certain injuries resulting in permanent partial disability. For other, unspecified injuries resulting in permanent partial disability, the injured employee is entitled to a percentage of his lost wage earning capacity during the continuance of his disability. The Deputy Commissioner found claimant to be permanently partially disabled from a cause not specifically enumerated. Claimant's executrix brought suit to have that finding set aside and to have §908 declared unconstitutional and its enforcement enjoined. Plaintiff's theory was that §908(c) discriminated unfairly against persons with certain classes of injury and thus denied them "equal protection of the laws." Plaintiff requested that a three-judge district court be convened to adjudicate the matter.

The district court declined to call for a three-judge court and dismissed the suit instead. The Court of Appeals affirmed, noting that Congress enjoyed great latitude in promulgating a program of workmen's compensation. The appellate court ruled that the compensation scheme was clearly not irrational and that, inasmuch as the suit presented no substantial federal question, it was unnecessary to convene a three-judge court.

Staff: Edward Berlin (Civil Division)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT - MALPRACTICE

Calculated Risks Permissible in Modern and Enlightened Treatment of Mentally Ill. Mrs. Kenneth Baker, etc. v. United States (S.D. Iowa, February 13, 1964). Plaintiff's husband, a mental patient at a V.A. hospital, was seriously injured

in the course of his attempt at suicide. Plaintiff sought to hold the Government liable for failing to maintain proper supervision over her husband. The V.A. doctor at the hospital, upon the basis of his own examination, had concluded that the husband was not a real suicide risk. Therefore, in accordance with V.A. hospital policy, he had assigned the patient to a relatively unrestricted open ward. The patient was injured three days later when he climbed over a fence and threw himself down a shaft.

The District Court entered judgment for the Government. It held, on the basis of the evidence presented, that the V.A. doctor's course of treatment was not negligence in the circumstances presented. In this regard, the Court said "Calculated risks of necessity must be taken if the modern and enlightened treatment of the mentally ill is to be pursued intelligently and rationally. Neither the hospital nor the doctor are insurers of the patient's health and safety. They can only be required to use that degree of knowledge, skill, care and attention exercised by others in like circumstances."

The Court's opinion also noted out that, while the Veterans Administration regulation fostering minimum restraint in the care and treatment of patients comes within the discretionary function exception of 28 U.S.C. 2680(a); the applicability of that policy to each individual case does not.

Staff: United States Attorney Donald A. Wine, and Assistant United States Attorney Leo D. Gross (S.D. Iowa), Vincent H. Cohen (Civil Division)

STATE COURT

FEDERAL TORT CLAIMS ACT - PROCEDURE

Tort Suit Against Federal Driver in State Court Will Not Be Dismissed Under 28 U.S.C. 2679(b) Unless Attorney General Certifies That Employee Was Acting Within Scope of Employment at Time of Accident and Removes Case to Federal Court, Thereby Substituting United States as Party Defendant. Jarrell v. Gordy (Louisiana Court of Appeals, 3rd Cir., March 24, 1964). Plaintiff sued two private defendants and their insurance carrier in the state court for injuries received in an automobile accident involving defendants' car and an Army truck. The insurance carrier filed a third-party action against the Army driver. After producing affidavits from the Post Quartermaster that he was acting within the scope of his employment at the time of the accident, the Army driver, represented by the U.S. Attorney, moved for dismissal of the third-party action against him. He urged that under 28 U.S.C. 2679(b) he was immune from suit and that a suit against the United States under the provisions of the Federal Tort Claims Act was the third party plaintiff's remedy in this situation. The state court dismissed the complaint against the Army driver.

The Louisiana Court of Appeals, Third Circuit, reversed. The appellate court agreed that section 2679(b) obviously expressed a Congressional intent to relieve from personal liability Government drivers involved in automobile accidents while acting within the scope of their employment. However, the Court held that section 2679(b) must be read in conjunction with 28 U.S.C.

2679(c) and (d), enacted at the same time. Reading these sections together, the Court concluded that, in order to provide immunity to the Government driver, the procedure set forth in 28 U.S.C. 2679(d) must be followed. As there provided, the Attorney General must (1) certify that the employee was acting within the scope of his employment at the time of the accident, and (2) remove the suit to the federal district court. By such removal the United States is substituted as party defendant for the driver and the suit deemed one under the Federal Tort Claims Act. In the absence of such action by the Attorney General, the Court held, a personal suit against the Army driver would continue to lie.

Staff: United States Attorney Edward L. Shaheen (W.D. La.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Civil Rights; Criminal Contempt. United States of America v. Ross R. Barnett, Governor of the State of Mississippi, and Paul B. Johnson, Jr., Lieutenant Governor of the State of Mississippi. DJ File 51-40-17 This case arises out of criminal contempt proceedings brought in the Court of Appeals for the Fifth Circuit against Ross R. Barnett and Paul B. Johnson, Jr., then Governor and Lieutenant Governor of the State of Mississippi, for violating a temporary restraining order issued by that Court restraining the defendants from interfering with James Meredith's admission to and continued attendance at the University of Mississippi and from interfering with and obstructing the execution of prior orders of that Court. The Court of Appeals, being evenly divided over the question of whether the defendants had the right to a trial by jury, certified the question to the United States Supreme Court under 28 U.S.C. 1254(3).

On April 6, 1964, the Supreme Court, in a 5-4 decision, agreed with the United States that the defendants were not entitled to trial by jury. The Court rejected the contention that such a right exists under 18 U.S.C. 402 and 18 U.S.C. 3691, which guarantee the right to a jury trial in contempt proceedings arising out of disobedience to an order "of any district court of the United States or any court of the District of Columbia", provided that the conduct complained of also constitutes a criminal offense under the laws of the United States or of any State. The Court held that these provisions did not apply to contempt proceedings initiated in the courts of appeals. On the constitutional issue the Court relied on Green v. United States, 356 U.S. 165 (1958), and a long line of cases preceding it, in concluding that there is no constitutional right to jury trial in criminal contempt cases. In a footnote, however, the Court stated that "In view of the impending contempt hearing, effective administration of justice requires that this dictum be added: Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." Since the four dissenting Justices would have gone further and would have required jury trial regardless of the punishment imposed, apparently a majority of the Court would support the position expounded in the footnote.

Staff: Archibald Cox, Solicitor General; Burke Marshall, Assistant Attorney General; Louis F. Claiborne, Assistant to the Solicitor General; Harold H. Greene, David Rubin (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

IMMUNITY

Compelling Grand Jury Testimony in Racketeering Cases Under FCC Act (47 U.S.C. 409(1)). A Federal Grand Jury in Orangeburg, South Carolina, indicted the Sheriff of Darlington County and four of his deputies for liquor law violations, conspiracy and one count each under 47 U.S.C. 501 and 502. The Sheriff had been engaged in the business of manufacturing and transporting moonshine whiskey, which business utilized interstate phone calls. Also the Sheriff and his deputies sold "protection" from state and Federal authorities to other moonshiners. This consisted of using police vehicles to patrol the roads over which the moonshine was transported, escorting the whiskey trucks to the State line, and using the police radio net to co-ordinate the operation.

Title 47 Section 203(c) requires the Telephone Company to file tariffs setting out the conditions under which service is furnished. One tariff states that the service is not to be used for "any unlawful purpose". Section 203(c) further prohibits furnishing service contrary to a tariff. Section 501 renders criminal (inter alia) "causing" the Telephone Company to violate 203. Similarly, Section 502 punishes anyone who violates a FCC regulation concerning licensed radio transmissions; one such regulation permits the use of the Police Radio Service for law enforcement purposes only.

Here, the telephone was allegedly used in the conduct of an illegal business, such that the Sheriff violated Section 501 by causing the Telephone Company to violate Section 203(c). Moreover, the Sheriff allegedly used the police radio net contrary to FCC regulations--hence in violation of Section 502. Thus, when the Grand Jury was empaneled, it was authorized to investigate these violations as well as the more obvious liquor law offenses. Therefore, when three reluctant witnesses were encountered, their testimony could be and was compelled after they had refused to testify on the ground that the testimony would tend to incriminate them. Under Section 409(1) of Title 47 they were immune from prosecution for any matter, transaction or thing about which their testimony was compelled.

Staff: United States Attorney Terrell Glenn (E.D. S.C.);
Edward T. Joyce, Organized Crime and Racketeering Section, Criminal Division.

MAIL FRAUD

Mailings in Furtherance of Fraudulent Scheme; Lulling Letters. Beasley v. United States, 327 F. 2d 566 (C.A. 10, 1964). Appellant was convicted of violations of the mail fraud statute, 18 U.S.C. 1341, under a scheme whereby he sold through the mails fractional interests in land represented to contain valuable uranium deposits although he knew that his title to the land was doubtful and that the existence of the uranium deposits was not shown by reliable exploratory operations.

Upon appeal appellant contended that the count letters were all written and mailed after the victims had paid their money, and hence did not relate to a mailing for the purpose of executing the scheme to defraud, citing Kann v. United States, 323 U.S. 88, and Parr v. United States, 363 U.S. 370. However, the Circuit Court pointed out that, in Sampson v. United States, 371 U.S. 75, the Court held these cases did not apply to a situation where the mailings, after the money had passed, were by the defendant to the victims for the purpose of lulling the victims by assurances that the promised services would be performed. Noting that the letters in question contained extravagant statements as to value, and assurances of success, the Circuit Court concluded that appellant wrote lulling letters to assure the victims that they would suffer no loss and that he would perform, and that such continuing use of the mails for the purpose of executing the scheme to defraud is within the mail fraud statute as construed in the Sampson case.

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

CUSTOMS

Conviction of Dealer in Smuggled Watches; Proof of Illegal Importations; United States v. Max Blum (C.A. 2, March 10, 1964). D.J. File 54-52-184. Defendant, a watch dealer, was convicted by a jury and sentenced to 18 months' imprisonment under 18 U.S.C. 545, for fraudulent facilitation of transportation and fraudulent receipt of Swiss watch movements, knowing the same to have been imported into the United States contrary to law. The watch movements were discovered in San Diego where they had been received for shipment to defendant in Brooklyn, N.Y. They had apparently, on some unknown date, been smuggled into the United States at an unknown port. On appeal, defendant attacked the admissibility and sufficiency of the Government's proof of illegal importation of the watches. The conviction was affirmed.

Pursuant to a 1936 agreement with Switzerland, watch movements exported to the United States from Switzerland must be stamped with a mark or symbol to distinguish each United States importer. Where Swiss watches and movements are imported without a distinguishing stamped symbol, all customs collectors are required to furnish full particulars to the Swiss Consul General in New York. To prove unlawful importation in this case, the Government had experts testify that the watch movements in issue were Swiss made, unsymboled, and were less than five years old; then proceeded on the theory that the watch movements could not have entered lawfully without some official record having been made of the importation. The Government introduced certifications by 45 Collectors of Customs that they had found no record of the importation of Swiss watch movements since 1954 that corresponded to the unsymboled movements found in defendant's possession. However, since these Collectors did not include New York, the Government introduced a document--certified by the State Department as a true copy of a note from the Swiss Embassy and of a declaration by the Swiss Consul in New York, declaring that the Swiss Consul General, the custodian of the official records, had no record since 1954 of a report relating to unsymboled watch movements of the description of those found in defendant's possession. The Court of Appeals held that even though some years were missing

from some of the reports, these reports from the Collectors' offices have probative value. In any event, the proof as to the agreement to report to the Swiss Consul in New York all unmarked movements the instructions and practice of all Customs offices to do so, and the certificate as to lack of such reports to the Consulate concerning watch movements of the description of these movements, for the entire period in question, was found to be sufficient to base a finding of unlawful importation. Further, the Court held that the certificate of the Consul General was properly admissible under Rule 27, F.R. Cr. P.; see also Rule 26 F.R. Cr. P., and Rule 44 F.R. Civ. P. "[S]ince the record is that of an official agency of a foreign government, the certificate of the Swiss Consul General, attested by the Swiss Ambassador and tramsmitted through the Secretary of State of the United States, complies with the spirit and terms of Rule 44(a)." The Court also cited 28 U.S.C. 1732 (records kept in the regular course of business) as being applicable.

Staff: United States Attorney Joseph P. Hoey (E.D. N.Y.).
Special Assistant to the United States Attorney
Jerome F. Matedero.

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Condemnation of "Health Foods" Labeled as Drugs; False Labeling of Resulting Mixture of Ingredient Drugs That Had Been Properly Labeled While in Interstate Commerce. United States v. Detroit Vital Foods, Inc. (C.A. 6, 1964). D.J. File 21-37-140. The Court of Appeals unanimously affirmed a judgment of the District Court for the Eastern District of Michigan condemning certain "drugs" for being misbranded. These drugs were "health food" products labeled "Michigan Brand Korleen Tablets", "Lelord Kordel's 'Frutex' Fruit Salad", etc., and represented in the labeling as adequate and effective treatment for hardening of the arteries, coronary attacks, varicose veins, arthritis, inflammation of the eyes, gall bladder distress, high blood pressure, premature aging, prevention of poisoning, bleeding gums, fever, common colds, alcoholism, pyorrhea, etc. etc. etc..

The Court of Appeals observed that: "Mislabeling and misbranding are perils to the public to which many of the provisions of the Federal Food, Drug, and Cosmetic Act are directed." It further noted that the dangers of misrepresentations in literature accompanying drugs, such as in this case, were sharply pointed out in United States v. Kordel, 164 F. 2d 193 (C.A. 7), where the president of the claimant company in this case, Lelord Kordel, was the criminal defendant. (The cited case was affirmed by the United States Supreme Court, Kordel v. United States, 335 U.S. 345 (1948), four justices dissenting as to one aspect of the case.)

Following extensive pre-trial litigation, claimant entered into a consent decree reserving the right to appeal on certain legal questions. The Court of Appeals affirming the decree, ruled that even though the drug "Korleen" constituted a new compound made up in Michigan of various ingredients (vitamins, etc.) that had been brought in from outside the state properly labeled, it was nevertheless "a drug held for sale after shipment in interstate commerce." The ingredients of the Korleen Tablets did not lose their identity as individual components when combined to form the drug, which was not something new and different -

particularly since claimant's labeling had emphasized the value of each of the ingredients of the product. In summary, the Court said:

> It is our view that by misbranding "Korleen Tablets" made from ingredient drugs that had been properly labeled in the course of interstate commerce, the misbranding came within the prohibitory provisions of the Federal Food, Drug, and Cosmetic Act.

Staff: United States Attorney Lawrence Gubow; Assistant United States Attorney Milton J. Trumbauer, Jr. (E.D. Mich.).

EVIDENCE

Witness' Prior Inconsistent Statements Admitted as Substantive Evidence on Retrial. United States v. Francis J. DeSisto (C.A. 2, March 20, 1964) D.J. File 123-52-76. Appellant was convicted in the Eastern District of New York under 18 U.S.C. 1951 for hijacking a truck-load of silk goods. His conviction was reversed for errors in the trial, and after a new trial he was again convicted. On appeal, DeSisto argued that under Bridges v. Wixon, 326 U.S. 135, 153-154 (1945) a witness' prior inconsistent statements are admissible only as affecting his credibility, and that the trial judge erred in allowing the jury to consider as substantive evidence the truck driver's prior testimony identifying DeSisto, which was partially recanted at the second trial. The Second Circuit held that the much criticized orthodox rule making a witness' prior statements admissible only for impeachment purposes was inapplicable when the prior statements were testimony at a former trial or were adopted by such testimony. Such former testimony, unlike the unsworn statements in the Bridges case, was taken under oath, was subject to cross-examination when given, was accurately recorded and transcribed, and should be more accurate than present recollection by virtue of its greater proximity to the event being described.

In the case of identification testimony, the Court felt the exception to the orthodox rule permitted by the Bridges' opinion might properly embrace not only testimony identifying DeSisto at the first trial, but also the even more probative earlier identifications (in an FBI lineup and before the grand jury) for which the witness later vouched in the grand jury room and at the former trial. The witness' prior statements were, therefore, found to have been properly admitted as substantive evidence identifying DeSisto as the hijacker, and the conviction was affirmed.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Raymond B. Grunewald (E.D. N.Y.).

COMMODITY CREDIT CORPORATION CHARTER ACT

Conspiracy to Violate the Act. United States v. Clarence T. Hansen and Herman W. Hansen (D.S. Dak.) D.J. File 120-69-358. This case arose under the 1961 Corn Crop Loan and Purchase Agreement Program which provided for the granting of loans by the Commodity Credit Corporation on corn produced by the borrower

and stored in a warehouse having a Uniform Grain Storage Agreement with CCC. Defendants were partners in the operation of three such warehouses. The indictment was based on the fact that in connection with a large number of such loans the borrowers obtained loans on corn purchased in whole or in part from defendants, and submitted false documentation supplied by defendants in connection with the application for such loans. Defendants were charged with making false statements and causing the borrowers to submit such false statements to the CCC (15 U.S.C. 714m(a) and 18 U.S.C. 2), the submission of false invoices to the CCC (15 U.S.C. 714m(a)) and conspiracy to violate the Act (15 U.S.C. 714m(d)).

After a trial lasting three weeks, defendants were found guilty of the conspiracy count of the indictment.

Staff: United States Attorney Harold C. Doyle;
Assistant United States Attorney Travis H. Lewin
(D. S. Dak.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Administrative Authorities Erred in Denying Suspension of Deportation. Percy Briggs Wadman v. INS (C.A. 9, No. 18645; March 26, 1964.) DJ File 39-12-729. Petitioner, a British national, brought this action under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a, challenging a final order for his deportation and the denial of his application for suspension of deportation.

A Special Inquiry Officer and the Board of Immigration Appeals found petitioner, who was admitted for permanent residence in 1955, was deportable in that prior to his entry he had been convicted of a crime involving moral turpitude, to wit, the British offense of receiving stolen property. Petitioner asserted that every violation of the British statute would not necessarily involve moral turpitude, and therefore that a conviction under the statute could not be regarded as involving moral turpitude for purposes of determining deportability. The Court agreed that some violations of the statute would not involve moral turpitude, but found that petitioner's did after examination of the record of his conviction which showed that petitioner received the property knowing it to have been stolen.

Petitioner's application for suspension of deportation was denied on the ground that he failed to establish that he had been physically present in the United States for seven years and that during such period he had been a person of good moral character. His physical presence was held by the administrative authorities to have been broken by reason of a five-day visit in Mexico. The Court held that this determination should be reconsidered in the light of Rosenberg v. Fleuti, 374 U.S. 449, in which the Supreme Court ruled that the alien Fleuti, a lawful permanent resident of the United States, had not made an entry upon his return to the United States after a visit of a few hours in Mexico.

The Court took issue with the administrative finding that petitioner had committed adultery and therefore was precluded from establishing good moral character by reason of the provisions of Section 101(f) of the Immigration and Nationality Act, 8 U.S.C. 1101(f). Petitioner admitted that he had had sexual intercourse on two occasions with a woman not his wife. The Court noted that the Federal law did not define adultery and that under the Civil Code of California, where the acts of intercourse took place, adultery is defined as the voluntary sexual intercourse of a married person with a person other than the offender's wife. The Court further noted that petitioner's conduct could not be held to constitute the crime of adultery under California law because it did not amount to cohabitation. After finding that the

suspension of deportation statute should be liberally construed the Court ruled that the two acts of intercourse by petitioner after the desertion of his spouse did not amount to adultery under Section 101(f) and hence to bad moral character under the suspension statute. The matter was remanded for further administrative proceedings.

Staff: United States Attorney Francis C. Whelan and Assistant United States Attorney James R. Dooley (S.D. Calif.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Discharge of Civilian Employee of Navy From Sensitive Position For Failure to Be Granted Security Clearance. Harrison v. McNamara, Secretary of Defense, et al. (D. Conn.) (D.J. #146-200-33379). Plaintiff applied for employment as Inspector (Electronic Equipment) at the Sikorsky Airfield in Stratford, Connecticut. The position being "sensitive", an inspector has access to "classified" (secret) information. Plaintiff was appointed as a temporary employee as inspector and assigned work which he could perform without having access to "classified" information, pending a security clearance. Subsequently he was removed from his position for failure to be granted a security clearance. The basis for his termination was falsification and omission of material facts on his applications for employment, and behavior indicating that he was not reliable or trustworthy, precluding his being granted a security clearance. He was charged with making false answers that he had never been a member of a Communist organization, that he had never associated closely with Communists, and that he had never been arrested, charged, or held by law enforcement officers.

The statutory basis for the defendants' actions in removing plaintiff from his job is 5 U.S.C. 22-1, which empowers the Secretary of the Navy to discharge any civilian employee when he concludes that the national security requires it. Under this statute, a "permanent" employee who has passed his probationary period may demand a hearing. As plaintiff had not acquired the status of a "permanent" employee, he was denied a hearing. Plaintiff attacked the constitutionality of the statute in its failure to require a hearing for temporary employees as violating the Due Process Clause of the Fifth Amendment to the Constitution. Swan, C.J., writing for a three-judge court, distinguished this case from Greene v. McElroy, 360 U.S. 474 in that the statute (5 U.S.C. 22-1) here involved specifically authorizes the procedure that was followed, granted the defense motion for summary judgment, and dismissed the action on the merits.

Staff: F. Kirk Maddrix (Internal Security Division)

Registration of Individual Members of Communist Party Under Section 8 of Subversive Activities Control Act (50 U.S.C. 781, et seq.); Validity and Constitutionality of the Statute; Albertson v. S.A.C.B.; Proctor v. S.A.C.B. (C.A.D.C., April 23, 1964) (D.J. #146-7-51-1552). The United States Court of Appeals for the District of Columbia Circuit unanimously affirmed the orders of the Subversive Activities Control Board requiring these two individuals to register under Section 8 of the Subversive Activities Control Act as members of the Communist Party of the USA, a Communist-action organization.

In seeking review of the Board's orders, petitioners contended the registration requirements violated their Fifth Amendment privilege against self-incrimination; they denied the Party was a Communist-action organization; and argued that Section 8 and 13 of the Act were invalid on various other Constitutional grounds. The Court of Appeals ruled on the issues as follows:

(1) The decision of the Supreme Court in the Communist Party case, 367 U.S. 1, holding the Fifth Amendment question to be premature was equally applicable to the circumstances with respect to the individuals here; and the question should not be passed upon until the denial of that claim is pressed to the point of criminal prosecution for refusing to register under the Act. Neither could the Court now pass on the subsidary contention that, so construed, the Act compels production of potentially incriminating information while allowing the Fifth Amendment privilege only under circumstances which effectively nullify the Amendment's protection.

(2) Also premature were the contention that the Act deprives petitioners of their right to trial by jury in not affording an opportunity to relitigate the status of the Party as a Communist-action organization; and the contention that the Act unconstitutionally delegates Congressional power to the Attorney General to specify the information to be supplied as an incident to registration because of failure to provide adequate standards.

The Court held the following questions were ripe for review, and pointed out that in the Communist Party decision the Supreme Court had rejected similar contentions made by the Party as made by petitioners here. Accordingly, the Court of Appeals held that: (1) The member registration provisions of the Act do not violate due process because they exact admissions which serve no Governmental purposes; that Section 8 is not distinguishable from Section 7 since it is only an alternative method of achieving the Government's aim of disclosure and operates only if the Party has not registered under Section 7. (2) First Amendment rights of free speech as weighed against the menace of the Communist conspiracy as found to exist by Congress justifies resulting invasions of private rights. (3) Neither do the provisions impose an unjustifiable restraint on rights of association in violation of the First Amendment or Due Process rights; or (4) Constitute a bill of attainder.

Staff: The case was argued by Kevin T. Maroney (Internal Security Division)
With him on the brief were:
George B. Searls,
Lee B. Anderson,
(Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Tort Claims Act; Discretionary Function Exception; Tucker Act Limitations; Claims Based on Aircraft Flights. James L. Bundy v. United States (S. D. Ga.) D. J. File No. 90-1-23-1051. Plaintiff on April 12, 1963 instituted this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), to recover the depreciation in market value of his property located under the air traffic patterns of military aircraft operating from Hunter Air Force Base, Georgia. Hunter Air Force Base became a medium jet bomber base on December 31, 1953, and plaintiff acquired title to the property in question on August 9, 1958.

On April 20, 1964, Judge F. M. Scarlett granted the Government's motion for summary judgment on the grounds that the matters complained of, if proven, amounted to a taking of an avigation easement over plaintiff's property, which taking occurred on December 31, 1953, and the claim was therefore barred by limitations, 28 U.S.C. 2401(a). Moreover, plaintiff acquired title to the property on August 9, 1958, after the taking had occurred and his claim was invalid as being in violation of the Assignment of Claims Act, 31 U.S.C. 203, as amended. In addition, Judge Scarlett ruled that the complaint could not stand under the Federal Tort Claims Act because the allegations therein demonstrated that the conduct and acts complained of would fall within the discretionary function exceptions of the Federal Tort Claims Act, 28 U.S.C. 2680.

Staff: Assistant United States Attorney William R. Lewis (S. D. Ga.) and Arthur C. Latina (Lands Division)

Public Lands: Cancellation of Erroneously Issued Patent. United States v. McCall (D. Nev., March 24, 1964), D. J. File No. 90-1-18-501. On August 4, 1960, the Patent Section of the Bureau of Land Management in Washington issued a patent, based on sand and gravel mineral locations, covering 400 acres of land in the Las Vegas Valley situated within five miles from downtown Las Vegas. When the patent was sent to the Land Office for delivery to the patentee it was ascertained that it erroneously covered 400 acres rather than the 40 acres described in an amendment appearing on the back of the "Final Certificate" which formed the basis of the Patent Section's authorization to act. (When originally executed the final certificate had covered 2,080 acres but at a later date, for reasons which remained obscure, it had been amended to cover only 400 acres.) It was then ascertained that the clerks in the Patent Section had failed to notice that the amended 400-acre description appearing on the front of the final certificate had again been amended by a notation on the back of that certificate to cover only 40 acres. The original patent was not delivered to the patentee. Instead, it was returned to Washington where the official copy in the departmental records was destroyed and a new patent issued bearing the same date and number covering only 40 acres. The corrected patent was then delivered to the patentee. Thereafter, the Bureau of Land Management was informed by the Solicitor, Department of the Interior, that a patent is officially issued when a copy is placed in the departmental records, that delivery of a patent is not neces-

sary to pass title and that the only way in which the matter could be corrected would be by a suit in equity to have the 400-acre patent cancelled. United States v. Schurz, 102 U. S. 378, 402.

Defendant took the position that there had been no mistake in issuing a patent, that the change in the final certificate from 2,080 acres to 400 acres was based upon a finding that 400 acres satisfied the discovery requirements, that Interior officials had agreed to issue the 400-acre patent before the change was made and that the 40-acre limitation on the back of the final certificate had not been placed thereon until after the 400-acre patent had issued.

Following a two-day trial in Las Vegas before visiting Judge Pence of the United States District Court for the District of Hawaii, the Court handed down an opinion sustaining the Government's contention that the patent had been issued by mistake, declaring defendant's contentions erroneous and decreeing that the patent be cancelled.

This is one of the few modern cases involving cancellation of a land patent. It is based upon a principle developed in earlier times that land patents issued as a result of mistake, even though unilateral, may be cancelled in order to prevent dissipation of the public domain.

This suit constitutes one of a group of variegated cases which have resulted from the facts that (a) sand and gravel, prior to the Act of July 23, 1955, 30 U.S.C. 611, was considered a locatable mineral under the mining laws, (b) almost the entire Las Vegas Valley is one continuous sand and gravel deposit, (c) land in the Las Vegas Valley has developed a tremendous potential value by reason of the development of the city of Las Vegas and (d) mining claims (which are not filed with the Department of the Interior) were filed on thousands of acres of land later classified for disposition under the Small Tract Act. See Foster v. Seaton, 106 U. S. App. D. C. 253, 271 F. 2d 836, 838-839 (1959); Mulkern v. Hammitt, 326 F. 2d 896 (C. A. 9, 1964). In addition, two cases are pending in the United States Court of Appeals for the Ninth Circuit and additional cases are pending in the United States District Court for the District of Nevada.

Staff: Thos. L. McKevitt (Lands Division).

Public Lands: Mineral Leasing Act; Drawings for Similarly Filed Application; Multiple Filings by Same Interest to Improve Chances. Robertson v. Udall (D. D.C., April 14, 1964), D. J. File No. 90-1-18-611. The Mineral Leasing Act of 1920 provides that public lands not on a known geological structure shall be leased to the first qualified applicant. This provision often resulted in actual physical violence between applicants seeking to be the first to place their applications on file. See Thor-Westcliffe Development, Inc. v. Udall, 114 U.S. App. D. C. 252, 314 F. 2d 257 (1963), cert. den., 373 U. S. 951. To meet the situation, the Secretary of the Interior, in 1960, adopted a regulation which provided that all applications received within a five-day period would be considered as simultaneously filed and that priority would be determined by a drawing. This effort to solve one problem created others. As one writer put it, "If one has even a mildly devious mind, it is easy to imagine ways and means

of gaining an unfair mathematical advantage in the drawings."

This case involved a plan that would do credit to the proverbial Philadelphia lawyer. Prior to the time when certain potentially valuable lands in Alaska were to be opened for lease application, a Denver oil man obtained the services of a friend of his in Dallas to see that a corporation under their control was well represented in the upcoming drawing. The Dallas friend solicited some 59 people to sign 39 lease offers, covering 2,500 acres each, and to transmit the signed offers to Denver, together with 39 checks in the amount of $1,300 each. The descriptions were filled in in Denver and the applications taken to Alaska for filing. All of the applicants were asked to sign a contract with Transwestern Investment Company, Inc., wherein it was agreed, inter alia, that if any of the applicants were successful in the drawing, blank assignments of the lease would be delivered to the company and the proceeds of any sale (after deduction of the filing fees) split between the successful applicant and the company. The company also agreed to deposit sums which might be required to cover all but one of the checks furnished by the applicants. As a result of the agreement, the company, although filing no applications of its own, ended up in a position permitting it to obtain a one-half interest in the proceeds from the sale of all leases awarded to any one of 59 different applicants in the drawing for each of the 39 leasing blocks involved. Thus, Transwestern had, in effect, 59 chances to 1 for other applicants.

Following the drawing (in which those having an agreement with Transwestern ended up as successful drawees with respect to six tracts), a protest was lodged by a later applicant on the ground that use of the same post office box in Dallas as the mailing address of so many of the applicants indicated collusion. The local manager held this to be insufficient evidence. On appeal, however, the Director, Bureau of Land Management, conducted an extensive investigation and ascertained the facts with respect to the prior agreement. He thereupon upheld the protest and directed that a new sale and drawing be held with respect to the six tracts. The Secretary affirmed. The Secretary also held that the agreement between the applicants and Transwestern constituted the latter an agent who, by regulation, was required to report the details of the agency arrangement and that the company's failure to do so constituted an additional reason for rejecting the applications.

Challenging the Secretary's decision in a proceeding brought under the Administrative Procedure Act, the applicants contended that the scheme was not a collusive one because none of the applicants ended up with more than one chance as to any particular leasing block and because the agreement to sell a one-half interest in the lease to the investment company represented only a fee for the services of that company in selling the lease. On April 14, 1964, the Court sustained a motion for summary judgment filed on behalf of the defendant Secretary of the Interior. A suit challenging the same decision of the Secretary is pending in the United States District Court for the District of Alaska. This anomaly results from the Act of October 5, 1962, 76 Stat. 744, 28 U.S.C. 1361, which permits suits against Government officers in varying jurisdictions.

Staff: Thos. L. McKevitt (Lands Division).

Tort Claims Act; Discretionary Function Exception; Tucker Act Limitations; Claims Based on Aircraft Noise in Testing. Ronald Nichols, et al. v. United States (S. D. Cal.) D. J. File No.90-1-23-1067. On April 1, 1964, Judge M. D. Crocker ruled in favor of the United States after a full hearing on the issue as to whether the United States could be held liable under the Federal Tort Claims Act for injury and damage to plaintiffs' property and business allegedly resulting from the noise and vibration emanating from the running and testing of jet engines at Castle Air Force Base. Plaintiffs' property is located near the air base but not subject to flights and plaintiffs claimed that the noise and vibration emanating from the testing of the jet engines constituted a trespass and a nuisance. The Court ruled that the selection of the place to test jet engines is a discretionary function of the defendant and therefore it lacked jurisdiction by reason of the provisions of 28 U.S.C. 2680(a).

The Court also ruled that the claim under the Tucker Act, 28 U.S.C. 1346 (a)(2), was barred by limitations for the reason that the acts complained of had started more than six years prior to the filing of the action and the claim was therefore barred by limitations, 28 U.S.C. 2401(a).

Staff: Assistant United States Attorney Richard J. Dauber (S. D. Cal.), and Arthur C. Latina (Lands Division).

Tucker Act: Avigation Easements; Limitations--When Cause of Action Accrues; No Recovery for Noise Alone Without Physical Invasion by Low and Frequent Flights. Grace E. Avery, et al. v. United States (No. 192-60, Court of Claims) D. J. File No. 90-1-23-868. Action was brought to recover $109,000 allegedly representing just compensation for taking of avigation easements over 33 parcels of land in the vicinity of Sanford Naval Air Station, Florida.

Eighteen parcels are located under the flight path at the west end of the main runway and consisted of improved and unimproved lands. In 1953, Sanford Naval Air Station was reactivated and stocked with jet fighter planes. However, the jets then operating were equipped with two reciprocating and one jet engine. In 1957, the Sky Warrior was placed in operation and this aircraft, the A3D, is much heavier and larger than the previous aircraft in use at the Station and contains two jet engines.

In 1953, the United States filed a condemnation suit to acquire an avigation easement over 17 of the 18 parcels. The case was not tried until 1959, at which time the parties entered into a stipulation to the effect that the parcels should be valued as affected by the aircraft in operation when suit was filed in 1953 and not as of the time of trial in 1959. That stipulation waived the defense of res judicata which might otherwise have been available by virtue of the Government's acquisition of a "perpetual easement and right of way for the free and unobstructed passage of aircraft in, through and over" the parcels.

Just compensation was determined and paid in the condemnation case. Thereafter, plaintiffs brought the present action, covering the above parcels as well as 15 other parcels which are not under the flight path.

Plaintiffs who are the owners of some of the 15 parcels contended that the Government nevertheless had acquired an easement as a result of the physical invasion of their properties by sound waves, smoke and fumes. Some of the parcels in these groups are located immediately adjoining the west end of the runway and are subjected to noise which was found to be "terrific and 'indescribable'". The noise and fumes from aircraft taking off from that runway caused the houses to shake, the windows to rattle, growing citrus fruit to fall from the trees on the properties, and interfered with conversations and disturbed sleep on occasions at night when aircraft would take off as frequently as one every three minutes.

Following its decision in Klein v. United States, 152 C. Cls. 221, cert. den., 366 U. S. 936, and other similar cases, the Court concluded that although jet aircraft had been operated over the parcels under the flight path for more than six years prior to the institution of the action, the claim for taking of an avigation easement over those parcels was not barred by limitations. The introduction of the new type of heavier aircraft which emitted considerably more noise and interfered more seriously with the use and enjoyment of the premises over which they flew at low elevations constituted the taking of a new and more extensive easement.

However, following the decision in Batten v. United States, 306 F. 2d 580 (C. A. 10, 1962), cert. den., 371 U. S. 956, the Court unanimously agreed that the owners of parcels not under the flight path were not entitled to recover because the mere generation of noise and the occasional emission of fumes did not constitute a physical invasion of the property sufficient to result in the taking by the United States of an interest in those properties.

On the basis of the opinion, findings and conclusions, the Court adopted the commissioner's finding that the parcels under the flight path were further diminished in value but only to the extent of $17,800 and allowed judgment for that sum. The Court made no allowance for the diminution in value to the other parcels which the commissioner had found diminished in value by virtue of the noise in sums ranging from $250 to as much as $3,000.

Staff: Herbert Pittle (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Judgment-Debtor-Taxpayer Can Be Required to Undergo Physical Examination Which Is Pre-requisite of Payment of Insurance Policies to Government as Substantive Duty Owed by Debtor to Creditor. Solomon Fried v. New York Life Insurance Co. and United States. (E.D. N.Y., April 24, 1964). Taxpayer, Dr. Soloman Fried, had been adjudged liable to the United States for tax liabilities amounting to some $200,000. One of his assets was certain disability insurance policies pursuant to which, until July 1, 1960, he had submitted to physical examinations and received benefits therefrom. Following entry of the judgment and its appeal (subsequently affirmed), taxpayer declined to take a physical examination, for if he did, the proceeds of the policy would have been turned over to the United States to satisfy his tax liens.

The United States filed a motion to require taxpayer to undergo a physical examination. The Court held that it was not an "inherent" power of the Court to compel a physical examination for evidentiary purposes although such permission could be expressly granted; but that "it was not to be drawn from the cases that there is an absence of 'equity' power to compel the doing of a harmless and costless act that is necessary to effect the payment of money to a creditor in reduction of the examined person's debt. The duty to perform such acts . . . is every debtor's duty." The Court specifically concluded that it had the power to cause a judgment debtor to take a physical examination, for "submission to physical examination in the circumstances of this case is precisely cognate to sitting down to sign a deed or write a check, or to surrendering a horse, or to surrendering a residence."

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Stanley Meltzer (E.D. N.Y.); and Robert L. Handros and Maurice Adelman, Jr. (Tax Division)

Internal Revenue Summons: No Notice of Second Inspection of Taxpayer's Books of Accounts Required Where Examination Relate to Years Other Than Covered in Books; Where Three-year Statute of Limitations Has Expired Internal Revenue Service Entitled to Inspect Books and Records Without Prior Showing That Exception to Limitation Applies. James E. Simmons v. Russell M. Tolley (S.D. Ind., January 17, 1964). (CCH 64-1 USTC ¶9281). The petition in this case seeks the enforcement of an Internal Revenue summons issued on August 15, 1963, to respondent, Tolley, which required him to produce books and records of Russell M. Tolley & Associates, a proprietorship, covering the year 1957. The books and records of the company for 1957 were inspected by IRS in March, 1962, in connection with an examination of the tax liabilities for the years 1958 and 1959. In July, 1962, IRS delivered to respondent a notice of a second inspection of the books and records of the respondent covering the year 1957.

The findings of fact are silent on whether the notice of second inspection of July, 1962, was followed by an examination of the 1957 records in the year 1962 in addition to the proposed examination pursuant to the summons of August 15, 1963. However, the Court made it very clear that where IRS is examining the tax liabilities of years other than those which are covered in the books of account demanded, that it is unnecessary to send a notice of second inspection under Section 7605(b). In re Norda Essential Oil and Chemical Co., 253 F. 2d 700 (C.A. 2, 1958). Consequently, the Court held that a notice of second inspection of the books of account of the proprietorship, Russell M. Tolley & Associates, covering the years 1957 for use in connection with the tax liabilities of the corporation Russell M. Tolley & Associates, Inc., for the years 1958 and 1959 was unnecessary. The rationale of the Court's finding is that a notice of second inspection of books of account within the contemplation of 26 U.S.C. 7605(b) is required only where there has been a previous inspection of the books of account for the years under examination.

Respondent also raised the defense of unnecessary examination or investigation under 26 U.S.C. 7605(b) in that IRS was barred by the three year statute of limitations, under 26 U.S.C. 6501(a), from making any further assessment and therefore, its proposed examination is unnecessary unless it is shown that circumstances exist which indicate the applicability of the exception to Section 6501(a) provided for in 26 U.S.C. 6501(e)(1)(A) dealing with the omission of 25 per cent or more from gross income. Recognizing the impracticability of the standard which respondent urged the Court to adopt, the Court ruled that IRS is not required to show that it falls within the exception to the three year statute of limitations because to do so would require IRS to prove the grounds for its belief prior to examining the only records which provide the ultimate proof. United States v. United Distillers Products Corporation, 156 F. 2d 872.

Staff: United States Attorney Richard P. Stein (S.D. Ind.)
and Frank J. Violanti (Tax Division)

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