Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

June 26, 1964

United States

DEPARTMENT OF JUSTICE

Vol. 12 No. 13

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 12 June 26, 1964 No. 13

ADMINISTRATIVE DIVISION

Assistant Attorney General S. A. Andretta

WITNESSES FOR INDIGENT DEFENDANTS UNDER CRIMINAL RULE 17(B)

We have observed that in some districts the requirements for subpoenaing witnesses on behalf of indigent defendants pursuant to Rule 17(b), F.R. Cr. P., are not given careful attention.

All offices are reminded that the motion or request under Rule 17(b) must be supported by an affidavit, and that the subpoena must be based on the court order allowing the witness or witnesses to be produced at Government expense.

When Armed Forces witnesses are requested for an indigent and the Form DJ-49 is forwarded to the Department, a copy of the court order should be attached to this form. If time does not permit the submission of the form, the telegraphic or telephonic request should indicate that the court order is on file.

It is the duty of the United States Attorney to guide Court-appointed attorneys as to expenses payable by the government and at rates not exceeding those authorized for government witnesses. If the court allows the indigent to produce an expert witness, the United States Attorney should forward a Form 25B in the same manner as he does for government witnesses, indicating that these fees were negotiated and were approved by the court.

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 12, Vol. 12 dated June 12, 1964:

MEMOS	DATED	DISTRIBUTION	SUBJECT
373	6-17-64	U.S. Attys & Marshals	Report of Outstanding Obligations
374	6- 3-64	U.S. Attorneys	Delegation of Authority to U.S. Attorneys in Civil Division Cases

MEMOS	DATED	DISTRIBUTION	SUBJECT
375	6- 3-64	U.S. Attorneys	Prescribing Standards for Handling Alleged Criminal Violations of Agricultural Adjustment Act, as Amended
376	6- 3-64	U.S. Attorneys	Procedure for Enforcement of Civil Penalties & Forfeitures in Cases of Violation of Navigation & Shipping Laws
319-S1	5-25-64	U.S. Attys & Marshals	Maintenance of Leave Records on S.F. 1130 - Manual of Leave Procedures

ORDER	DATED	DISTRIBUTION	SUBJECT
315-64	6- 1-64	U.S. Attys & Marshals	Amendment to Dept. of Justice Organization Order (No. 271-62) Authorizing Assistant Atty. Gen. in Charge of Criminal Div. to Redelegate His Authority to Compromise and Close Civil Claims.

* * *

ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

District Court Orders Compulsory Reasonable Royalty Licensing. United States v. The Singer Manufacturing Company (S.D. N.Y.) D.J. File 60-79-5. On June 2, 1964 Chief Judge Sylvester J. Ryan filed his "Opinion on Judgment and Remedies" in this case. His earlier opinion (205 F. Supp. 394 (1962) dismissing the complaint was reversed by the Supreme Court and remanded for the entry of an appropriate decree (374 U.S. 174 (1963). Following this decision, hearings were held to consider the provisions of the final judgment and these hearings were completed in February 1964.

In this opinion in which he ordered compulsory reasonable royalty licensing of all five patents involved, Judge Ryan rejected defendant's contention that the conspiracy found by the Supreme Court was to acquire but one patent--"to accomplish the unlawful exclusion" and held, as the Government contended, that the conspiracy was one to exclude Japanese competitors in household zigzag sewing machines and that the patents were used in furtherance of this conspiracy. However, Judge Ryan denied the relief sought by the Government - the non-enforcement of the patents - even though he held that two of the five patents were obtained for an illegal purpose. He stated, in summary, "the Supreme Court has to date refused to approve either royalty-free licensing or non-enforcement of patents" and that "the only [test] which must guide the Court in framing an antitrust decree is what measure must be applied in order to dispel the evil effects of the defendant's wrongful conduct--which means what will restore competition."

Staff: John J. Galgay, John D. Swartz, William Elkins, Edward F. Corcoran, Les J. Weinstein, Howard Breindel, and James J. Farrell (Antitrust Division)

Contempt Proceedings Instituted For Violation of Final Judgment. United States v. Ekco Products Company, et. al. (N.D. Calif.) DJ File 60-122-63. On May 26, 1964 civil and criminal contempt proceedings were filed in the District Court at San Francisco against Ekco Products Co. of Chicago, Illinois, and four of its subsidiary companies - Glaco Co. of Pittsburgh, Bridgeville, Pa; Glaco Columbus Co., Columbus, Ohio; Glaco New Jersey Co., Fairlawn, N.J., and Glaco Potomac Co., Baltimore, Md.

The Government charged wilful violation by the defendants of a final judgment entered July 1, 1957 and of an amended final judgment entered March 20, 1962 by furnishing, in selected areas, pan glazing services at prices lower than defendants' published prices for the purpose and with the effect of eliminating competition. The final judgments require defendants to publish their prices for pan glazing services and to sell such services only at such published prices except that defendants may offer to meet a

lower price of a competition. The Government charged that defendants have pursued a deliberate program of not only meeting competitive prices for such services, but undercutting competitor's prices in certain competitive areas.

The show cause order is returnable June 25, 1964.

Staff: Earl A. Jinkinson; Frank R. Reynolds, Jr., Howard L. Fink; and Harry N. Burgess (Antitrust Division)

District Court Sets Aside Civil Investigative Demand. Petition of Chattanooga Pharmaceutical Association For An Order Setting Aside Civil Investigative Demand No. 0298 (E.D. Tenn.). On January 19, 1964, the United States served a civil investigative demand upon the Chattanooga Pharmaceutical Association reciting that it was issued for the purpose of ascertaining whether there is or has been a violation of Section 1 of the Sherman Act by (a) Price fixing of drug products and other drug store items; (b) Shopping, investigating, and policing drug stores to determine whether or not they are charging fair-trade prices; and (c) Urging, inducing, compelling, coercing, harassing, and boycotting druggists to force them to maintain minimum resale prices on fair-traded items.

On February 3, 1964, the Association filed a petition for an order "as to whether or not [petitioner] should be required to comply with the said Civil Investigative Demand in the light of the above allegations." Subsequently, the Government filed a petition to compel compliance. The petitioning Association urged, inter alia, (1) that the demand should be set aside because the Attorney General does not state the reason for the issuance thereof, and (2) that the demand in its recitation of the conduct of the Association fails to state a violation of the antitrust law to be found in Section 1 of the Sherman Act.

The District Court held that the documents concerning the alleged misconduct are exempt from investigation since the Miller-Tydings Act, as extended by the McGuire Act, exempts from price fixing articles sold by retailers at the minimum or specified prices fixed by contract with manufacturers and within the Fair Trade Law of Tennessee. Further, that the method by which druggists might undertake to make other druggists abide by law is a State problem and not a Federal violation and, therefore, a matter about which the Federal Government has no right of investigation.

Staff: Homer W. Hanscom and Howard B. Rockman (Antitrust Division).

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

ADMIRALTY--OBSTRUCTIONS IN NAVIGABLE WATERS

Riparian Landowner who Stores Heavy Material Alongside Navigable Stream Is Liable to United States for Cost of Removing Resultant Shoal in Channel. United States v. Perma Paving Co., et al. (Nos. 28,494 and 28,495, C.A. 2, June 2, 1964). DJ# 62-51-224. The City of New York leased certain waterfront property to Perma to be used for the storage of bricks, granite, and fill. The land was of a marshy character and adjacent to navigable waters of the Bronx River. Charging that the overburdening of the riparian lands had caused a mud shoal to be formed in the river, the Government sued the City and Perma to recover the cost of removing that obstruction from the navigable channel. From a district court judgment holding the City and Perma jointly and severally liable to the United States, the City appealed.

The Second Circuit affirmed. The Court noted that 33 U.S.C. 403 prohibits the unauthorized creation of obstructions in navigable waters and 33 U.S.C. 407 makes it unlawful "to deposit, or cause, suffer or procure to be deposited material of any kind on the bank of any navigable water. . .where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods or otherwise, whereby navigation shall or may be impeded or instructed." The Court then cited United States v. Republic Steel Corp., 326 U.S. 482, as deciding that the deposit of solids affecting the navigable capacity of a stream created an "obstruction" within 33 U.S.C. 403, and held that the rule is the same when the placing of excessive weight along the shore causes the soil to move into the stream. The Second Circuit rejected the City's contention that, although the district court concededly could have issued an injunction directing the City to remove the shoal, it could not award damages to reimburse the United States for performing that work. The Court stated:

> It seems altogether plain that if Congress had done nothing more than prohibit such obstructions or make them unlawful, the Attorney General could have enforced the statute by any appropriate means, including a suit for recovery of amounts expended by the United States in removing the obstructions, even without a direction to him to enforce the Act such as is contained in 33 U.S.C. §413. United States v. San Jacinto Tin Co., 125 U.S. 273 (1888). We see no basis for thinking that the imposition of criminal penalties and the specific authorization of injunctive relief for a particular purpose indicated a Congressional desire to withhold a remedy which in many instances will be more appropriate.

The Second Circuit distinguished United States v. Bethlehem Steel Corp., 319 F. 2d 512 (C.A. 9), certiorari denied 375 U.S. 966, which refused to allow the United States to recover damages for the removal of a wrecked ship which the owner had abandoned. The Court ruled that detailed provisions in 33 U.S.C. 409-415 with respect to wrecked vessels afforded reasons for absolving

shipowners from in personam liability not applicable to the case at bar.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorneys Robert E. Kushner and James G. Griesler (S.D. N.Y.).

In Ship Collision in Fog, Navy Minesweeper Held at Fault, on Ground of Failure to Anchor or Leave Channel. United States, et al. v. M/V WUERTTEMBERG, et al. (C.A. 4, April 13, 1964). DJ# 61-67-7. The M/V WUERTTEMBERG collided with the Navy minesweeper U.S.S. SWERVE in Charleston harbor. In the district court, only the merchant vessel participating in the collision was held at fault for having proceeded through the fog at undue speed and without radar. However, the Court of Appeals held that the Navy minesweeper was also at fault. In the Fourth Circuit's opinion, advance radar notice of the on-coming merchant vessel required the minesweeper to avoid not only a collision but also the risk of collision in fog. In the circumstances, the Court ruled that the naval vessel should have left the channel for nearby waters assumed to be of sufficient depth.

Staff: Thomas F. McGovern (Civil Division)

AGRICULTURAL ADJUSTMENT ACT OF 1938

Where Tenant Overplanted, Wheat Acreage of Farm Held Properly Reduced Despite Owner's Claim That Tenant Acted Without Permission and Contrary to Instructions. Clarence J. Malone, etc., et al. v. Hurlbut Graves, et al. (C.A. 10, May 22, 1964). DJ# 106-29-200. In 1959, a farm entitled to a wheat acreage allotment under the Agricultural Adjustment Act of 1938, 7 U.S.C. 1281, was leased to a tenant. In spite of the owner's protests, the tenant exceeded the farm's wheat allotment for that year and marketed some of the excess. The County Review Committee found that the tenant was solely responsible for this non-compliance and that the owner had done everything he could in order to prevent it. Because of this 1959 non-compliance, the 1961 wheat allotment for the farm was reduced from what it otherwise would have been. Specifically, the reduction was made because the 1959 wheat history under the Secretary's regulations was a factor in arriving at the 1961 allotment, and under the statutory definition in 7 U.S.C. 1334(c)(1) the wheat history for a year of non-compliance is less that it would have been but for the non-compliance.

Appellants, the owner and new tenant, challenged the 1961 allotment on the broad ground that they should not be "penalized" because of what the old tenant had done, particularly where they had done everything in their power to prevent the 1959 non-compliance. Relying upon the asserted "equitable" powers of a district court, based upon the language of the judicial review provision of the Act which refers to the initial pleading as a "bill in equity," they challenged the constitutionality of the Act as here applied, arguing that the Act does not permit the "penalization" of one person where it was another who caused the violation.

The Court of Appeals rejected these arguments, holding that the 1961 allotment was in accordance with the statute and regulations; that the "equity" label given the judicial review proceeding did not empower a court to disregard

the statute and regulations; that the Act was not unconstitutional as applied here; and that appellants' argument that they were being "punished" for the misdeeds of another furnished no basis for a court's ignoring the requirements of the statute. As to this last point, the Court further observed that allotments are made to farms, not to individuals, and that to ignore the farm's noncompliance and award it a greater allotment would have the effect of decreasing the allotments of other farms in the county. The Court concluded by pointing out that the balancing of the equities in situations like this is for Congress, not the courts.

Staff: John C. Eldridge (Civil Division)

FEDERAL TORT CLAIMS ACT

Tort Action Complaining Generally About Manner in Which United States Carried Out Its Duty to Enforce Court Orders, and Objecting Specifically to Firing of Tear Gas at Plaintiff, Barred by "Discretionary Function" and "Assault and Battery" Exceptions in Tort Claims Act, 28 U.S.C. 2680(a) and (h). United States v. Faneca (C.A. 5, June 1, 1964). DJ# 144-41-489. This companion case to Norton v. McShane (reported under "Official Immunity," infra) was brought by a University of Mississippi student against Deputy Attorney General Katzenbach, Chief United States Marshal McShane and the United States. Plaintiff sought damages as a result of allegedly tortious conduct in the planning and execution of the Government's effort to enforce court orders directing the enrollment of James H. Meredith at the University. In this case the district court refused to dismiss the action, but the Fifth Circuit reversed.

The Court of Appeals ordered the action against the individual defendants dismissed on the basis of the court's decision in Norton v. McShane, infra. In addition to the affidavits of Attorney General Kennedy and Deputy Attorney General Katzenbach, the depositions of the plaintiff, defendant McShane and a high official of the State of Mississippi demonstrated clearly that the tear gas firing complained of was done within the scope of official authority and in pursuance of official duty.

The action against the United States was also ordered dismissed by reason of express exceptions to the waiver of sovereign immunity contained in the Tort Claims Act. As to plaintiff's complaint regarding the planning and execution of the Oxford operation, the Fifth Circuit held the claim barred by the "discretionary function" exception, 28 U.S.C. 2680(a). And, although couched in terms of negligence, the appellate court agreed that plaintiff's allegations regarding the intentional firing of tear gas at him constituted a complaint of assault and battery and thus barred by the exception for such torts provided in 28 U.S.C. 2680(h).

Staff: Assistant Attorney General John W. Douglas and Stephen B. Swartz (Civil Division)

Soldier, Smoking in Bed at Night in Government-Rented Quarters Provided Off Post, Not Acting in Scope of Employment for Purposes of Imposing Tort Liability on Government Where Carelessness with Cigarette Burns Down House. Merritt, et al. v. United States (C.A. 1, June 1, 1964). DJ# 157-36-1008.

Plaintiffs had leased their house in Massachusetts to the Army for use as off-post family housing for military personnel. They filed this action under the Tort Claims Act when the house was destroyed by a fire negligently started by a serviceman smoking at night in bed. In a decision which should be very helpful to us in the proper administration of the Tort Claims Act, the Court of Appeals affirmed the district court's dismissal of the complaint and expressly adopted our two basic arguments:

(1) Even though the serviceman may have been deemed to be acting in the "line of duty" for the purpose of determining his eligibility as to veterans' pension benefit claims, and even though the Tort Claims Act defines "scope of employment" for military personnel to mean "in line of duty", the serviceman was nevertheless not acting--for the purpose of the Tort Claims Act--within the scope of his military employment while smoking in bed at night. Hence there could be no respondeat superior liability imposed on the United States under the Tort Claims Act.

(2) Even though Massachusetts law may make a tenant liable in tort to the lessor for permissive waste committed even by a stranger and even though the liability of the United States under the Tort Claims Act is generally analogized to that of a private individual under like circumstances, there can be no recovery under the permissive waste theory here because the equating of federal liability under the Act to that of a private individual does not begin until it is established that the claim is based on the respondeat superior doctrine, i.e., that it is based on a negligent or wrongful act of a federal employee acting within the scope of his employment. Since the permissive waste liability is not based on such a claim, it cannot serve as a basis for recovery of damages under the Tort Claims Act.

Staff: Morton Hollander and Harvey L. Zuckman (Civil Division)

NATIONAL HOUSING ACT

Provision in FHA-insured Mortgages for Appointment of Receiver to Collect Rents During Foreclosure Uniformly Enforceable Pursuant to Federal Law. United States v. Chester Park Apartments, Inc. (C.A. 8, May 28, 1964). DJ# 130-39-1414. This action was brought by the United States to foreclose an FHA-insured mortgage assigned to the Government by the mortgagee upon default to the mortgagor. Pursuant to a standard clause in the FHA mortgage, the Government moved for the appointment of a receiver to collect rents during the pendency of the foreclosure proceedings. The mortgagor resisted such appointment on the ground that such a mortgage provision was invalid and unenforceable under state law. The district court refused to appoint a receiver, holding itself bound to apply state law by United States v. Kramel, 234 F. 2d 577 (C.A. 8).

We applied for and were permitted to prosecute an interlocutory appeal. The Eighth Circuit agreed with the Government's argument that, under the doctrine of Clearfield Trust Co. v. United States, 318 U.S. 363, and in accordance with the decision in an identical case, United States v. View Crest Garden Apartments, Inc., 268 F. 2d 380 (C.A. 9), certiorari denied, 361 U.S. 884, the

standard mortgage provision for appointment of a receiver during foreclosure is fully enforceable under a single, uniform federal rule. The Court of Appeals distinguished its earlier Kramel decision, and agreed that the instant case did not present one of those exceptional circumstances in which federal law and policy permitted adoption by state law.

Staff: Stephen B. Swartz (Civil Division)

OFFICIAL IMMUNITY

Federal Officials Acting Within Scope of Authority to Carry Out and Enforce Court Orders Are Immune From Suit For Acts Committed in Pursuance of Official Duty; Party Resisting Motion for Summary Judgment Supported by Affidavit May Not Rely Upon Pleadings But Must File Responsive Counter-Affidavits. Norton v. McShane (C.A. 5, June 1, 1964). DJ# 145-12-842. This suit was brought by three individuals against Deputy Attorney General Katzenbach, Chief United States Marshal McShane, First Assistant to the Assistant Attorney General, Civil Rights Division, John Doar, and a Deputy United States Marshal. Plaintiffs sought to recover damages for alleged wrongful conduct committed in connection with the enrollment of James H. Meredith at the University of Mississippi. Plaintiffs, residents of Alabama, alleged in essence that on the day after the disturbance at the University the car in which they were riding was stopped at a roadblock near Oxford, Mississippi, by defendants, who then maliciously, unlawfully and unconstitutionally arrested and detained them.

The Department filed a motion to dismiss the suit on the ground that defendants had acted in the course of their official duties and were therefore immune from suit. The motion to dismiss was supported by an affidavit from Attorney General Kennedy stating in effect that, at the time and places alleged in the complaint, defendants were acting in pursuance of their official duties and within the scope of their official authority. Summary judgment for defendants was granted by the district court.

The Fifth Circuit, one judge dissenting, affirmed. The Court of Appeals held that the immunity of federal officers is governed by federal law, citing Wheeldin v. Wheeler, 373 U.S. 647. (In a footnote, the Court suggested that in cases where state law may be applicable, the result reached here might not follow.) Supporting its holding with many citations, the Court went on to rule that, under the great weight of federal authority, law enforcement officers are immune from civil suits based on allegedly malicious acts. The Court concluded that, if the allegedly malicious action is of such nature that it is necessary that a Government official be freed to take it without fear or threat of vexatious or fictictious suits, and the act challenged is in fact done in an official capacity, then the Governmental official is immune from suit on account of it.

Turning to the case at bar, the Court of Appeals held that the affidavit of Attorney General Kennedy sufficiently established the basis of this defense. Plaintiffs' failure to contradict the Attorney General's sworn statement by counter-affidavit--as required by Rule 56(e), F.R. Civ. P.--justified the district court's dismissal of their complaint.

Staff: Assistant Attorney General John W. Douglas and Stephen B. Swartz (Civil Division)

SOVEREIGN IMMUNITY

Foreign Government May Raise Defense of Sovereign Immunity Without First Seeking Consent of U.S. State Department, But Court Not Absolutely Bound to Recognize Claim. Petrol Shipping Corporation v. The Kingdom of Greece (C.A. 2, May 25, 1964). DJ# 118-982-106. This case involved an in personam suit by a shipping company against Greece for breach of a charter party. Without seeking the support of the State Department, the Greek Government filed a suggestion of sovereign immunity and the district court dismissed the suit on this ground. On appeal, the shipping company argued that a foreign sovereign could not avail itself of the sovereign immunity defense unless our State Department supported the claim. The Kingdom of Greece, on the other hand, argued that in an in personam action, unlike an in rem action, the suggestion of sovereign immunity was conclusive whether supported by the State Department or not. The majority of a three-judge panel of the Second Circuit, agreeing with the Kingdom of Greece, affirmed the dismissal. Later, however, the entire Court ordered that the case be reheard en banc and requested the United States to file a brief as amicus curiae.

In our brief, we disagreed with both the position of the shipping company and that of the greek Government, arguing that there is no difference between in rem and in personam actions with respect to the sovereign immunity defense, and that in both types of actions the foreign government could seek State Department support for its sovereign immunity defense or could assert the defense itself without support from the Executive Branch. However, we pointed out to the Court that there is a difference in effect, depending upon whether the State Department supports the sovereign immunity claim. If the State Department supports the defense, and the Department of Justice so certifies to the court, this is conclusive and the court must dismiss the suit. But if the foreign sovereign suggests immunity without State Department support, then the court can scrutinize the claim in light of the evidence, in order to determine whether the case is an appropriate one for recognizing sovereign immunity, whether sovereign immunity has been waived, and other pertinent factors. Finally, we took the position that the sovereign immunity defense could be scrutinized in the instant case, that the facts were insufficiently developed to determine whether the defense ought to be accepted, and that the case should be remanded for further development of the facts.

The Second Circuit adopted our position, altered its previous decision, vacated the judgment of the district court, and remanded the case for the taking of evidence bearing upon the questions.

Staff: Morton Hollander, John C. Eldridge and Bruno Ristau (Civil Division)

SOCIAL SECURITY ACT

To Sustain Determination That Person Is Not Disabled, Secretary Need Not Show There Are in Fact Jobs Available to Claimant in Home Town. Celebrezze v. Hubert C. Kelley (C.A. 5, No. 21095, May 15, 1964). DJ# 137-40-19. Claimant, a 40-year old skilled cabinetmaker, experienced at making wooden military tank models, claimed to be disabled because of degenerative joint disease, obesity,

diabetes, a gunshot wound in his calf, and a kidney stone. The Secretary, however, determined that claimant's impairments were mild in character and that there was no apparent reason why he could not return to his former occupation as a model maker. The Secretary also found that a large number of other fields of work, of a light or sedentary nature, were open to claimant. The district court reversed the Secretary's decision, principally because the Secretary did not show that any of the suggested occupations were in fact available in claimant's community.

The Fifth Circuit in an opinion by Chief Judge Tuttle, reversed the district court, and reinstated the Secretary's decision. Reaffirming its position in Celebrezze v. O'Brient, 323 F. 2d 939, the Court of Appeals held that the Secretary need not demonstrate that there are jobs actually available to claimant in his home town:

> The duty of the administrator is to hear the evidence as to the physical capabilities of the claimant, to consider the nature and type of work for which he is still qualified, if any, and to determine whether the claimant's failure to obtain a job in one of these categories results from his physical condition rather than from any other cause. Celebrezze v. O'Brient, 5 Cir., 323 F. 2d 939. He must determine whether there is a reasonable opportunity for the claimant to compete, in the manner normally pursued by persons genuinely seeking work, for a job within his determined capabilities. In making this decision he must, of course, consider the matter of reasonable availability of jobs within the geographical areas which the claimant would normally be expected to consider if regularly in the labor market. The administrator is required to make findings and conclusions, in which he takes all of these factors into consideration. When he does so, if there is evidentiary support in the record for his findings, they are to be given finality and are not to be reversed or modified by the Courts. We find nothing in the cases of Butler v. Fleming, 5 Cir., 288 F. 2d 591, Hayes v. Celebrezze, 5 Cir., 311 F. 2d 648, or Page v. Celebrezze, 5 Cir., 311 F. 2d 757, strongly relied on by the trial court, that in any way conflicts with what we decide here.

Staff: Martin Jacobs (Civil Division)

WAR MOBILIZATION AND CONVERSION ACT

Municipality, Advanced Funds Under Act by Federal Works Agency to Prepare Plans For City Waterworks, Must Refund Advance When Waterworks Finally Built Eleven Years Later to New Plans. City of Greeley, Kansas v. United States, (No. 7484, C.A. 10, May 21, 1964). DJ# 117-29-37. Under the War Mobilization and Reconversion Act of 1944, 50 U.S.C. App. 1671, the Federal Government advanced $2,000 to the City of Greeley to prepare plans for a municipal waterworks system. The Act provides that such advances "shall be repaid . . . if and when the construction of the public works so planned is undertaken." The City used the money to have plans for the waterworks drawn up, but those plans were never put into effect. Later, the waterworks were constructed by the City pursuant to a different set of plans.

The district court ruled that the United States was entitled to recover the amount of the advance plus interest. The Tenth Circuit affirmed the judgment except for the interest provision. The Court of Appeals, relying on earlier cases in the Ninth and Fifth Circuits and a district court decision in North Dakota, held that "public work so planned," as used in the statute, was not restricted to the specific plan preparation financed by the advance but included "the public work present in the mind of the applicant at the time the funds were requested." Since the City eventually built the waterworks, albeit to a later "plan," the Government was entitled to a return of its advance.

The Tenth Circuit set aside the district court's award of interest, however. The Court interpreted certain language in the regulations of the Federal Works Agency to forbid such an award. As we believe this interpretation erroneous and inasmuch as the matter was raised by the City for the first time at oral argument, we are petitioning for a rehearing on the matter.

Staff: Lawrence R. Schneider (Civil Division)

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

School Segregation. Calhoun v. Latimer, 321 F. 2d 302 (C.A. 5), vacated and remanded 376 U.S. _____. (May 25, 1964). The Department of Justice, as amicus curiae, filed a brief with the Supreme Court opposing certain aspects of the Atlanta, Georgia school desegregation plan--a plan which had been modified and approved by the court of appeals. The Atlanta plan, initiated in 1961, proceeds at the pace of one grade a year, beginning with the twelfth grade and progressing downward. The plan does not affirmatively abolish the dual school system but assignments are originally made on the basis of race, and transfers are permitted only to the school most proximate to the student's residence. The plan preserves total segregation of school personnel.

In its brief to the Supreme Court, the Department contended that the Atlanta plan did not proceed "with all deliberate speed" and was not calculated to achieve desegregation "at the earliest practicable date." The Government argued that there was no justification for a twelve year plan of desegregation in 1961--six years after the Supreme Court had enjoined school authorities to eliminate segregation "with all deliberate speed" (Brown v. Board of Education, 349 U.S. 294). Moreover, whatever could be said in support of the original plan, it was now apparent that there were no administrative difficulties that stood in the way of accelerating the grade-a-year pace, and that such acceleration was required in light of the Supreme Court's decisions in Goss v. Board of Education of Knoxville, Tennessee, 373 U.S. 683 and Watson v. City of Memphis, 373 U.S. 526.

In addition to the speed of the plan, the Government also attacked the failure of school authorities to desegregate effectively even those grades reached by the plan. It was argued that a school desegregation plan that assigned students on the basis of race and then permitted transfers--no matter how liberally granted--did not conform to the Brown decision.

Finally, the Government urged that the desegregation of school personnel was an essential element of an effective school desegregation plan.

During argument of this case before the Supreme Court, counsel for the school board indicated that the board had made substantial changes in the plan since the decision of the court of appeals. Petitioners argued that the changes still did not meet constitutional standards. In view of this development, the Supreme Court ruled that it was appropriate that the new Atlanta plan be appraised by the district court in proper evidentiary hearing. Accordingly, the judgment was vacated and the case remanded. Significantly, however, the Court referred to its decisions in the Goss and Watson cases, supra, to emphasize that this many years after the Brown case the context in which the phrase "all deliberate speed" must be interpreted and applied has been significantly altered.

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

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FOOD AND DRUGS

False Statements and Omissions of Material Facts by Drug Manufacturer in New Drug Application. United States v. The Wm. S. Merrell Company, et al. (D.C., 1964). D.J. File 21-51-495. Between July 1959 and December 1, 1960, the Wm. S. Merrell Company and its parent corporation, Richardson-Merrell, Inc., filed with the Food and Drug Administration a New Drug Application and several supplements thereto relating to the drug known as MER-29 (Triparanol). During this period defendants also made statements, both orally and in writing, to the Food and Drug Administration relating to the safety of the drug.

These applications and statements set forth data and information purportedly obtained from various animal experiments to determine safety of the drug, some of which statements were false and fictitious. In addition, defendants failed to report significant data and results of other animal studies which tended to reveal possible toxic effect of the drug. In this way the manufacturer concealed from the Food and Drug Administration data and information indicating that the drug might have serious side effects in humans. Among the information concealed and falsified were the true results of experiments showing that the drug had seriously affected the eyes of the test animals by causing cataracts and opaque corneas. It was later found, after extensive use by the public, that the drug caused several undisclosed side effects in humans, the most serious of which was the formation of cataracts. In the first prosecution for such an offense the corporate defendants and three of its scientists, including the Vice President in charge of Research, were charged with violations of 18 U.S.C. 1001 arising out of the false statements and concealments of material facts in their dealings with the Food and Drug Administration.

On June 4, 1964, following pleas of nolo contendere, the corporate defendants were fined a total of $80,000. Imposition of sentence was suspended as to the individuals and they were placed on probation for six months.

In passing sentence the Court stated that the statute required full reports and that they "are to be full in the sense that there are to be no omissions, no alterations, no shadings, and the purpose of the report is to determine whether or not the drug in question is safe for use . . ."

After reading the probation report, the Court expressed the view that the responsibility for what had happened rested with the corporate defendants and its executive management because of a failure to exercise "proper executive, managerial and supervisional control."

Staff: James W. Knapp (Trial Staff, Criminal Division); Edward Szukelewicz and Robert Timlin (General Crimes Section, Criminal Division).

MAIL FRAUD

Correspondence School for Airline Personnel and Mechanics. Babson v.

United States (C.A. 9, April 8, 1964). D.J. File 36-11-94. Appellants were convicted on charges of conspiracy and violations of the mail fraud statute. Archie K. Babson, the former operator of a correspondence school for practical nursing, promoted a school for the training of jet airplane technicians. By the use of an extensive selling campaign, 1400 courses were sold with down payments ranging from $5 to several hundred dollars. The other appellant Victor J. Trial was a salesman for the course.

Appellants represented that a student completing the course could expect to secure a supervisory position paying an annual salary of from $8,000 to $15,000. Representatives of United Air Lines and General Motors testified however, that a graduate of the school would at best be hired at $2.25 an hour, and five years of actual shop training was required for a supervisory position. Moreover, the Civil Aeronautics Administration will not certify a school for airline mechanics unless it offers a course of 300 hours of engine work and 12,000 hours of study. Although the school represented that applicants for the course were screened, practically no student was rejected. The Court of Appeals noted that, "One notable instance was a policeman."

In reviewing the evidence with respect to appellant Trial, the Court of Appeals stated that he was a mature man with a college degree and some engineering experience and "cannot be regarded as a credulous salesman who innocently reiterated fraudulent representations prescribed by his superior."

In considering a further assignment of error that a new trial should be granted because the jury was intruded upon, the Court stated that the better rule to follow is that, when the jury is intruded upon, there is a presumption of prejudice which the prosecution may rebut, not the rule that a new trial must be granted. Under the circumstances in the case, the Court concluded that there was no intrusion upon the jury.

Staff: United States Attorney Cecil F. Poole;
Assistant United States Attorney Jerrold M. Ladar
(N.D. Calif.).

WAGERING TAX

Validity of Indictment Not Naming Alleged Principals When Defendants Charged Both as Principals and Agents; Impersonation of Intended Receiver Not Interception of Telephone Call Under 47 U.S.C. 605. United States v. Andrew Pasha, Peter Grafner and Arthur Monaco (C.A. 7, May 22, 1964.) D.J. File 160-23-43. Defendants were convicted under 26 U.S.C. 7203 for wilful failure to pay the wagering occupational tax and wilful failure to register and file an occupational tax return. The indictment charged that they were engaged in the business of accepting wagers, and that they received wagers on their own behalf and on behalf of other persons, not named, who were engaged in that business. The Court of Appeals found that, contrary to defendants' contentions, wagering occupational returns were required by law under both 26 U.S.C. 4412(c) and 6011(a). Moreover, the indictment was held valid despite its failure to name the principals on whose behalf the defendants were acting as agents, on the ground that the same occupational tax is payable by one engaged in the wagering business whether he himself operates the business or acts as an agent for someone else. As the defendants were here charged both as principals and

agents there was no need to name their principals, because the gravemen of the offenses of failure to register and pay the special occupational tax is simply the activity of engaging in the wagering business, regardless of whether one does so as principal or agent. (It is to be noted that this holding is a valuable precedent to be used in rebutting United States v. Pepe, 198 F. Supp. 226 (D. Del., 1961), wherein the Government was required to elect whether the defendant failed to register and pay the special tax as a principal or as an agent.)

After rejecting certain attacks on the validity of the search warrants used in this investigation, the Court upheld the admissibility of testimony concerning telephone conversations engaged in by Internal Revenue agents during the search of the apartment used in defendants' bookmaking activities. These agents answered calls from unidentified bettors and impersonated the various defendants in taking bets. Such conversations were held properly admitted as circumstantial evidence of the type of operation being conducted on the premises, and were found not to constitute an "interception" of a telephone communication prohibited by 47 U.S.C. 605. Relying upon State v. Carbone, 138 N.J. 19, 183 A. 2d 1 (1962), and Seeber v. United States, 329 F. 2d 572 (C.A. 9, 1964), the Seventh Circuit interpreted "interception" to mean a situation wherein a conversation between two parties is overheard by surreptitious means, and not the situation wherein a caller willingly converses with the answering party through mistake as to his true identity. Moreover, the Court's opinion explicitly rejected any distinction between the case of an investigator answering a bookmaker's phone without practicing any active impersonation and the agent who expressly represents that he is the intended receiver, for in either case the caller is intended to be deceived as to the receiver's identity.

COUNTERFEITING AND FORGERY

Making or Possessing Likenesses of Coins - 18 U.S.C. 489. Several matters involving interpretation of this section have recently come to the attention of the Criminal Division. To ensure some measure of uniformity throughout the country in the application of Section 489 United States Attorneys are advised that a detailed legal analysis of Section 489 is available at the Department. Please consult the Criminal Division if a serious question arises as to the applicability of this section.

Section 489 does not apply to likenesses of coins that qualify as counterfeit coins, since counterfeit coins are prohibited by Section 485, which carries a possible penalty of $5,000 fine and fifteen years' imprisonment. Rather, Section 489 is directed at devices which, although not strictly counterfeit coins, may be mistaken for genuine coins by the unwary or ignorant, because they approximate genuine coins in size, color, and design. In ruling on the legality of particular devices, United States Attorneys should consider the purpose of Section 489 and whether the questioned article is likely to be taken for money. It is not the intention of the section nor the desire of the Department to prohibit legitimate commercial devices where there is no danger of confusion by the public.

Several medallions commemorating the late President Kennedy are now being manufactured. If these medallions are substantially larger and heavier than any coin of the United States, and if they bear no indication of value and therefore do not purport to be money, they do not violate Section 489.

Plastic banks in the shape of enlarged coins do not violate Section 489, since no device that could function as a bank could also be mistaken for a coin. Thus prosecution has been declined of a bank in the shape and design of a dime, about three inches in diameter and five-eighths of an inch in depth, and of a bank that was a model of the Kennedy half-dollar, nine and three-eighths inches in diameter and two and one-quarter inches thick.

It has been suggested that plastic banks in the shape and design of coins may constitute dies, hubs, or molds within the meaning of 18 U.S.C. 487, since such banks might be capable of reduction to the size of actual coins by means of a pantograph machine. It is the opinion of this Division that Section 487 only applies to the actual dies, hubs, or molds, and does not encompass devices from which these articles can be made.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

JUDICIAL REVIEW

Judicial Review of Deportation Order, Denial of Voluntary Departure and Denial of Waiver of Foreign Residence under 8 U.S.C. 1182(e); Jurisdiction of Court. Victoria Marquez Talavera v. Pederson; C.A. 6, No. 15252, June 10, 1964. Petitioner filed a petition for review under 8 U.S.C. 1105a seeking judicial review of the final administrative order denying her applications for voluntary departure and for a waiver under 8 U.S.C. 1182(e) of the two years' residence abroad required of exchange aliens who seek an adjustment of status to that of a permanent resident. While the finding and order of deportation were not directly attacked in the petition, the Court took jurisdiction under the authority of Foti v. Immigration and Naturalization Service, 375 U.S. 217, which holds that a court of appeals has jurisdiction under 8 U.S.C. 1105a to review not only the orders of deportation but ancillary orders which may affect them.

In a prior deportation proceeding in 1961, petitioner was ordered deported for having procured a visa by fraud by concealing an extra-marital relationship, and for having admitted that she had committed adultery. The Board of Immigration Appeals, however, terminated those proceedings because of an administrative policy of long standing not to sustain a ground of deportation arising as a result of an alien's admission of the commission of an act of adultery in the absence of a conviction for that offense, and that the concealment of her illicit relationship was immaterial. She was then given permission to leave the United States voluntarily on or before May 15, 1962, and her failure to take advantage of that permission resulted in new deportation proceedings against her on the ground that she had remained in the United States for a longer time than permitted. The second proceeding resulted in a final order of deportation and the denial of the applications for relief for which judicial review was sought.

The Court disagreed with petitioner that the termination of her 1961 deportation proceedings was a bar to the second proceeding in 1962; for in the first she was charged with having procured a visa by fraud and in the second for having remained in the United States for a longer time than permitted by law, two charges which are entirely different. The Court said that a ruling on the first charge was in no way a ruling on the second. It added that the Immigration and Naturalization Service is an administrative agency and not a court, and the principle of res judicata is not applicable to its ruling, but that even if such a doctrine were to be applicable it would not operate as a bar in this case because of the difference in the charges.

The Court found no merit in her contention that if the admitted acts of adultery were insufficient to sustain the ground of deportation in 1961 they should not be permitted to deprive her in 1962 of the discretionary relief of voluntary departure. The Court said that in the 1962 proceeding deportability

was not based upon the acts of adultery but upon an entirely different ground; that the admitted acts of adultery were material only in the collateral matter of denial of discretionary relief which were not involved in the 1961 proceeding; that Congress acted reasonably and justifiably in requiring less for a denial of discretionary relief in the 1962 collateral proceeding than was required to establish deportability in the 1961 proceeding; and that the denial of discretionary relief was required under the express wording of the statute by reason of the acts of adultery irrespective of whether she was convicted of them.

With respect to the waiver of the two years of foreign residence under 8 U.S.C. 1182(e), the Court found that in the circumstances of this case she had not established the "exceptional hardship" which the statute requires, and that the Service's action in denying the waiver was proper. As to her contention that there is a denial of due process on this issue because no clear standards or criteria are set up as guideposts in the granting or denying of such a waiver, the Court said that if it were to assume that this provision of the Act is void and unenforceable, there is no statutory authority left in the Act providing for the waiver which petitioner sought.

The petition for review was dismissed.

Staff: United States Attorney Joseph P. Kinneary (S.D. Ohio)
Assistant United States Attorney Charles G. Heyd (S.D.Ohio)
Of Counsel: Attorneys Kenneth C. Shelver and
Don R. Bennett (Criminal Division)

NATURALIZATION

Qualifications for Naturalization: Willingness to Bear Arms and Membership in Industrial Workers of the World. Frederick Willard Thompson v. INS; C.A. 7, No. 14054, May 21, 1964. This was an appeal from an order of the district court denying appellant's petition for naturalization after a de novo hearing. A motion by petitioner to amend certain findings of fact, to strike others, and for a new trial was dismissed (318 F. 2d 681), but the Supreme Court granted certiorari and, in a per curiam 5-4 decision, reversed and remanded for a hearing of the appeal on the merits. Thompson v. INS, 374 U.S. 384.

Appellant, a Canadian national, filed a petition for naturalization in 1946 under the Nationality Act of 1940 in effect at that time. A protracted period of investigation followed, and in 1961 the Service recommended to the Court that his petition be denied on the ground that he had failed to establish his attachment to the principles of the Constitution because of his employment by and membership in the Industrial Workers of the World. During his examination before the Court at his final hearing, he was equivocal in his answers to questions concerning whether he would bear arms in defense of the United States under certain hypothetical circumstances, despite prior statements by him that he would willingly do so. Partly because of his association with the IWW and partly because of his equivocal testimony concerning the bearing of arms, the district court denied his petition.

On appeal, the Court of Appeals after reviewing the history of the case held that what the court below found to be an equivocal answer was to a series of questions that were "far-fetched to say the least". It also found that the district court's finding as to the IWW is similar to the finding as to the Socialist Workers Party which the Court of Appeals had disapproved in Scythes v. Webb, 307 F. 2d 905. Accordingly, the Court said that Thompson's petition for naturalization should have been granted and it reversed and remanded with appropriate instructions.

A dissenting opinion said that the conferring of American citizenship should not depend upon unexplained delays in the administrative process of the petition and that when he was pressed to answer a simple question categorically the petitioner gave an equivocal answer. The dissenter did not believe that the equivocal answer to a question which the majority considered "far-fetched" can be justified on that ground, and that one who harbors reservations in pledging loyalty to the United States is not entitled to citizenship therein.

Staff: Former United States Attorney James P. O'Brien (N.D. Ill.)
Of Counsel: Assistant United States Attorneys
John Peter Lulinski and John Powers Crowley.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Registration of Communist-action Organization Under Subversive Activities Control Act (50 U.S.C. 781, et seq) United States v. Communist Party of the United States (Supreme Court, October Term, 1963). D.J. File 158-1. On June 8, 1964 the Supreme Court denied the Government's petition for certiorari from the judgment of the Court of Appeals entered December 17, 1963. The Communist Party, having been ordered to register as a Communist-action organization under the Subversive Activities Control Act, declined to do so on the basis of claims that such registration would violate the privilege of its officers against self-incrimination under the Fifth Amendment. On December 1, 1961, the Party was indicted in the District Court for the District of Columbia for "willfully and unlawfully" failing to register as a Communist-action organization (11 counts) and failing to file a registration statement with the Attorney General (1 count). After a jury trial, the Party was convicted on all counts. The Court of Appeals reversed, remanding the case to the District Court with instructions to grant a new trial if the Government should request it for the purpose of presenting evidence that the Party could have found a volunteer willing to sign on its behalf, or, absent such a request, to enter a judgment of acquittal. The Government's petition for re-hearing en banc and the Party's petition for re-hearing were denied by the Court of Appeals. The Government petitioned for certiorari to the Supreme Court. The questions presented in the petition for certiorari were (1) Whether under Wilson v. United States, 221 U.S. 361, United States v. White, 322 U.S. 694, and Baltimore and Ohio Railroad v. Interstate Commerce Commission, 221 U.S. 612, the Party's officers may invoke their personal rights under the Fifth Amendment when called upon to register the Party in their official capacity; (2) Whether the Party's officers may, under the Fifth Amendment, refuse to register for the Party when they cannot possibly incriminate themselves by registration because the statute prohibits any information obtained by registration from being introduced in evidence in a judicial proceeding and no new leads to other information can result since Party officers have publicly stated their positions; (3) Whether, even assuming that the Party's officers could invoke the Fifth Amendment, the Party had a duty either to register through attorneys or other agents who could not incriminate themselves, or else to prove that no such agents were reasonably available.

In view of the refusal of the Supreme Court to grant certiorari, the Government must determine the action that should be taken under the judgment of the Court of Appeals.

Atomic Energy Act - Unauthorized Disclosure of Restricted Data Information to Agents of the U.S.S.R. United States v. George John Gessner D.J. File 146-41-15-2701. On March 30, 1962, a six count indictment was returned by a grand jury in Kansas City, Kansas, charging defendant, in five counts, with a violation of 42 U.S.C. 2274(a) and in one count with a violation of 50 U.S.C. 783(b). In the first five counts, Gessner was charged with communicating restricted data information concerning the construction and firing system of the Mark VII

nuclear weapon and the design and operation of the 280 mm and 8 inch gun type nuclear weapon to agents of the Union of Soviet Socialist Republics, and in the sixth count, with communicating classified information relating to the United States nuclear arsenal to persons the defendant had reason to know were representatives of the Union of Soviet Socialist Republics.

The trial was delayed due to a series of competency hearings held pursuant to 18 U.S.C. 4244. At the final hearing on April 11, 1964, Gessner was found competent to stand trial and the trial began on May 26, 1964. At the conclusion of the trial, the sixth count was withdrawn at the request of the Government and the Court submitted the first five counts to the jury. On June 9, 1964, defendant was found guilty on each of the five counts with a recommendation by the jury of life imprisonment on each count. Defendant was sentenced the same day to life imprisonment.

This case marks the first prosecution brought under this Section of the Atomic Energy Act.

Staff: United States Attorney Newell George (D. Kan.) Joseph T. Eddins and Paul C. Vincent (Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Mandamus, Federal Tort Claims Act, Congressional Relief for Entrymen of Reclamation Project. Merrill P. Smith, et al., Board of Commissioners v. United States, et al. (C.A. 10, June 3, 1964), D.J. File No. 90-1-2-719. This was an action instituted by the Board of Commissioners of an irrigation district in Wyoming on behalf of themselves and numerous other entrymen similarly situated, against the United States, the Department of the Interior, the Bureau of Reclamation, the Secretary of the Interior, and the Commissioner of Reclamation, to recover damages alleged to have been sustained by them because of the failure of the project to develop as represented to them before entering upon the lands. Relief in the nature of mandamus was sought under the Act of October 5, 1962, 28 U.S.C. 1361 and 1391(e), to order defendants (1) to provide adequate recompense for the losses sustained; (2) to make a determination of the lack of economic feasibility of the project; and (3) to have Congress give such relief "as will provide equity" to plaintiffs. The second claim was based on the Federal Tort Claims Act, seeking damages of $120,000 for each family unit, a total of $2,520,000. The action was dismissed on motion of defendants.

In affirming the judgment of the district court, the Court of Appeals accepted all of the Government's defenses. It held that prior to the 1962 Act the review of decisions of federal officers was in the District of Columbia courts, in terms of mandamus to force them to perform ministerial duties. The 1962 Act provides a remedy by which the same jurisdiction can be exercised throughout the country. It did not enlarge the scope of permissable mandamus relief. The Court further held that the claim for recovery for appellants' losses is an effort to obtain a money judgment against the United States, and it has never waived sovereign immunity to permit recovery in such circumstances.

The Court of Appeals held that the tort claims based on misrepresentation are barred by 28 U.S.C. 2680(h). It further held that the failure to make a finding of feasibility as required by the statute authorizing the reclamation project was an omission in the execution of a statute, and a failure to perform a discretionary duty, recovery for which is barred by 28 U.S.C. 2680(a).

The Court held that "in any event, Congress has acted to alleviate the plight of the plaintiffs." After the entry of the judgment in the trial court, Congress enacted legislation (Act of March 10, 1964, Public Law 88-278, 78 Stat. 156) which authorizes the Secretary of the Interior to negotiate with the entrymen here involved for the purchase of their lands at an appraised value determined without reference to deterioration in irrigability, and appropriates $2,000,000 for such acquisition and other purposes. The Act also provides that water deliveries are to continue for three years, and before January 1, 1967, the Secretary is to determine the economic feasibility of the project and report his findings to Congress.

Staff: Elizabeth Dudley (Lands Division).

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Internal Revenue Summons; President and Sole Shareholder of Corporation Cannot Invoke Fifth Amendment to Avoid Producing Corporate Books and Records. Albert J. Wild v. Bennet Y. Brewer (C.A. 9, June 2, 1964, on rehearing, 13 A.F.T.R. 2d 1622). A summons was served upon Wild, as president of Air Conditioning Supply Company, directing him to produce certain corporate records. Wild refused to comply upon the ground that as the sole shareholder of the corporation he held the records in a personal capacity, and to compel their production would violate his privilege against self-incrimination. The district court ordered compliance, holding that his Fifth Amendment privilege did not protect him from producing corporate records. The Ninth Circuit reversed, in a two-to-one opinion (329 F. 2d 924) holding that the sole shareholder of a corporation may invoke the Fifth Amendment as to corporate records. The Government filed a petition for rehearing en banc, pointing out the direct conflict between this decision and the controlling one of the Supreme Court in Grant v. United States, 227 U.S. 74. On rehearing, the original panel reversed itself, and affirmed the enforcement order in a two-to-one opinion, on the authority of Grant v. United States, supra, and Wilson v. United States, 221 U.S. 361.

Staff: Burton Berkley, Joseph M. Howard, Fred B. Ugast (Tax Division)

District Court Decisions

Mandamus: Taxpayer's Mandamus Suit Against Tax Court of United States and Tax Court Judge Dismissed Under Section 7482, I.R. Code, 1954, Section 732(c), I.R. Code, 1939, 28 U.S.C. 1361 and 2201. Sprague Electric Company v. The Tax Court of the United States and the Honorable John E. Mulroney (D. Mass., June 5, 1964). After the Tax Court decided against taxpayer certain issues involving the computation of its excess profits taxes for the years 1941 through 1945, taxpayer appealed to the First Circuit Court of Appeals and, at the same time, brought suit in the Federal District Court for Massachusetts against the Tax Court and Judge Mulroney "in the nature of mandamus" and prayed for an order to vacate the Tax Court order and to direct that taxpayer's taxes for 1941 through 1945 be recomputed (a) by including plaintiff's income from networks as an item of abnormal income attributable to prior years (involving taxes of some $260,000); (b) by eliminating electrolytics from the calculation of plaintiff's abnormal income and net abnormal income (involving approximately $90,000 in taxes); and (c) by excluding plaintiff's administrative and general expenses from the amounts subtracted from abnormal income (involving some $237,000 in taxes). Taxpayer alleged that by accepting the Commissioner's argument with respect to networks (allegedly raised for the first time on brief after the close of the evidence), the Tax Court exceeded its own rules of procedure, made a ruling unsupported by the evidence, and by refusing to reopen the case deprived taxpayer of a fair opportunity to present its case. With respect to

the electrolytics issue taxpayer alleged that by accepting an argument raised after the record was closed the Tax Court "committed a twofold abuse of discretion" in that (1) it violated its own rules of procedure by determining an issue not properly raised by the pleadings, and (2) it misinterpreted Section 721(a)(1) of the Internal Revenue Code of 1939. Taxpayer also alleged that the Tax Court arbitrarily ignored Section 721, the Treasury Regulations and other Tax Court decisions in holding that administrative and general expenses constitute direct costs or expenses within the meaning of the World War II Excess Profits Tax Act.

The Court granted the Government's motion to dismiss on the grounds that (1) the Court lacked jurisdiction over the subject matter, and (2) the complaint failed to state a claim upon which relief can be granted. The Court reasoned that the clear and only purpose of the suit was to obtain judicial review and reversal of the Tax Court ruling, and that Section 7482 of the Internal Revenue Code of 1954 (26 U.S.C. 1958 ed.) placed in the United States Court of Appeals exclusive jurisdiction to review, vacate, nullify and set aside a decision of the Tax Court. After quoting from Section 732(c) of the Internal Revenue Code of 1939 (which, in general, states that the Tax Court's determination of abnormal income shall not be reviewed or redetermined by any court or agency except the Tax Court), and noting that nine circuit courts of appeal have upheld the finality of this section and that the Supreme Court has repeatedly denied certiorari, the Court stated that "it would be over-reaching of the worst kind and an abuse of discretion on the part of a District Court to assume the right to review such a final decision by the Tax Court under the guise of exercising mandamus jurisdiction." The Court's final reason for holding that it had no jurisdiction over the subject matter was the express exception of federal taxes contained in the Federal Declaratory Judgment Act (28 U.S.C. 2201).

In holding that the complaint failed to state a claim upon which relief could be granted, the Court noted that the 1962 enactment of Section 1361 of Title 28, U.S.C., a venue statute, was obviously intended to increase the number of district courts in which actions for mandamus might be filed "and was not intended by Congress to create any new causes of action not authorized prior to its enactment, nor to repeal any existing statutory bars, other than those of a geographical nature, to the bringing of actions for mandamus". Finally, the Court held that mandamus is available in situations where a federal official has failed to perform a non-discretionary ministerial act, leaving open the question whether, if Judge Mulroney had refused to render any decision at all, an action would then lie to order him to file a decision either for or against the taxpayer.

Staff: United States Attorney W. Arthur Garrity, Jr.; Assistant United States Attorney Murray Falk (D. Mass.); and Wallace E. Maloney and Thomas R. Manning (Tax Division)

Action to Reduce Tax Claims to Judgment; Government's Prima Facie Presumption Sustained. United States v. Sidney R. Berens. (E.D. N.Y., March 12, 1964). (CCH 64-1 USTC ¶9342). The Commissioner of Internal Revenue made assessments for the years 1944, 1945, 1946, 1947, 1953 and 1954 totalling $191,876.05 against defendant, including assessments for fraud totalling $44,900.57. The greater portion of the Government's files in this case had

been destroyed, leaving insufficient proof available to sustain the fraud penalties. At the trial, the Government withdrew the portion of the assessments based on fraud. Defendant was without books and records sufficient to rebut the Government's prima facie case. Defendant relied upon his unsupported allegation that unreported receipts set up as deficiencies were loans by business friends who had since died. The Court found defendant's contentions to be vague, inconclusive, and uncorroborated and rejected them in their entirety. Holding defendant's rebuttal insufficient to overturn the Government's prima facie presumption of correctness, the Court entered judgment for the Government.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Thomas J. Lilly (E.D. N.Y.); and Arnold Miller (Tax Division)

Assignee Held Not Liable to United States Under 31 U.S.C. 192 For Payment He Made to Prior Assignee For Benefit of Wage Earners Pursuant to Court Order. United States v. Alfred A. Rosenberg and Fidelity & Deposit Co. of Maryland (E.D. N.Y., March 10, 1964). (CCH 64-1 USTC ¶9366). Taxpayer assigned its equity in accounts receivable to one Berman for the benefit taxpayer's of wage earners. Eleven days later, taxpayer made a general assignment for the benefit of creditors to defendant Rosenberg, who in turn, was bonded by defendant Fidelity. Notice of the federal tax claim of $10,564.88 was received by Rosenberg. Pursuant to a court order, Rosenberg subsequently received $3,899.50 from the accounts receivable which had been assigned previously to Berman.

The United States filed suit against Rosenberg and his surety alleging: the two assignments, the filing of the federal tax claim with Rosenberg, the New York Court order, and the payment by Rosenberg pursuant to that Court order. The complaint then charged Rosenberg with liability to the United States under 31, U.S.C. 192. The Court held that the proceeds of the accounts receivable had been assigned previously to Berman in an assignment which was, on its face, valid; therefore, Rosenberg, in obeying the Court order, did nothing more than surrender proceeds which belonged to Berman by virtue of the prior assignment. Under these circumstances, the Court held that the United States had no claim against Rosenberg Title 31 U.S.C. 192.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Leonard J. Theberge and William N. McKee, Jr. (E.D. N.Y.)

* * *