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MONTHLY TOTALS

Figures for the first eleven months of fiscal 1964 show increases in both filings and terminations over the same period of the previous year, with the number of terminations still trailing the number of filings. As a result, the caseload increased by over 1,300 cases, or almost 4 per cent. Unless a substantial increase in terminations is shown for the month of June, fiscal year 1964 will wind up with another rise in the pending caseload. Set out below is a comparison of cumulative totals for the first ten months of fiscal 1963 and 1964.

	First 11 Months Fiscal Year 1963	First 11 Months Fiscal Year 1964	Increase or Decrease Number	%
Filed				
Criminal	30,978	30,711	- 267	- .86
Civil	24,602	26,216	+ 1,614	+ 6.56
Total	55,580	56,927	+ 1,347	+ 2.42
Terminated				
Criminal	30,091	29,664	- 427	- 1.42
Civil	23,572	24,511	+ 939	+ 3.98
Total	53,663	54,175	+ 512	+ .95
Pending				
Criminal	10,218	10,860	+ 642	+ 6.28
Civil	23,334	24,025	+ 691	+ 2.96
Total	33,552	34,885	+ 1,333	+ 3.97

As can be seen from the following listing, the month of May was not a very active month from the standpoint of either filings or terminations. Criminal case terminations exceeded criminal case filings and this helped to keep the caseload rise below 4 per cent.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,252	2,456	4,708	2,305	2,129	4,434
Aug.	2,245	2,228	4,473	1,771	1,852	3,623
Sept.	3,365	2,267	5,632	2,584	1,920	4,504
Oct.	3,298	2,440	5,738	3,164	2,465	5,629
Nov.	2,794	1,789	4,583	3,020	1,806	4,826
Dec.	2,252	2,214	4,466	2,554	2,039	4,593
Jan.	2,855	2,496	5,351	2,853	2,461	5,314
Feb.	3,015	2,195	5,210	2,486	2,422	4,908
March	2,924	2,589	5,513	3,059	2,472	5,531
April	3,013	2,911	5,924	2,966	2,523	5,489
May	2,698	2,631	5,329	2,902	2,422	5,324

For the month of May, 1964 United States Attorneys reported collections of $4,213,887. This brings the total for the first eleven months of fiscal year 1964 to $51,251,959. Compared with the first eleven months of the previous fiscal year this is an increase of $13,840,916 or 37.00 per cent over the $37,411,043 collected during that period.

During May $38,951,291 was saved in 115 suits in which the government as defendant was sued for $40,678,780. 71 of them involving $14,595,122 were closed by compromises amounting to $1,270,177 and 20 of them involving $999,920 were closed by judgments amounting to $457,312. The remaining 24 suits involving $25,083,738 were won by the government. The total saved for the first eleven months of the current fiscal year aggregated $102,587,613 and is an increase of $48,954,866 or 91.28 per cent over the $53,632,747 saved in the first eleven months of fiscal year 1963.

The cost of operating United States Attorneys' Offices for the first eleven months of fiscal year 1964 amounted to $15,837,136 as compared to $14,998,372 for the first eleven months of the previous fiscal year. If projected to the end of the year, this would represent an increase of approximately $1.7 million over fiscal 1963.

DISTRICTS IN CURRENT STATUS

As of May 31, 1964, the number of districts meeting the standards of currency in civil cases and matters was higher than in the preceding month but in criminal cases and matters the number of districts current dropped considerably. In criminal cases, 75 districts, or 81.5% were current; in civil cases, 65 or 70.6%; in criminal matters, 53 or 57.6%; and in civil matters, 74 districts, or 80.4 were current.

CASES

Criminal

Ala., N.	Ark., E.	Conn.	Fla., S.	Hawaii
Ala., M.	Ark., W.	Del.	Ga., N.	Idaho
Ala., S.	Calif., S.	Dist.of Col.	Ga., M.	Ill., N.
Ariz.	Colo.	Fla., N.	Ga., S.	Ill., E.

CASES (Cont.)

Criminal

Ill., S.	Mich., W.	N.Y., E.	Ore.	Vt.
Ind., N.	Minn.	N.Y., S.	Pa., M.	Va., E.
Ind., S.	Miss., N.	N.Y., W.	Pa., W.	Va., W.
Iowa, N.	Miss., S.	N.C., E.	P.R.	Wash., E.
Iowa, S.	Mo., E.	N.C., M.	R.I.	Wash., W.
Kan.	Mo., W.	N.D.	S.D.	W.Va., N.
Ky., W.	Nev.	Ohio, N.	Tenn., E.	W.Va., S.
La., E.	N.H.	Ohio, S.	Tenn., W.	Wis., E.
La., W.	N.J.	Okla., N.	Tex., N.	Wyo.
Maine	N.Mex.	Okla., E.	Tex., S.	C.Z.
Mich., E.	N.Y., N.	Okla., W.	Tex., W.	Guam

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Idaho	Md.	Okla., N.	Tex., N.
Ala., S.	Ill., N.	Mich., W.	Okla., E.	Tex., S.
Ariz.	Ill., E.	Miss., N.	Okla., W.	Tex., W.
Ark., E.	Ill., S.	Miss., S.	Pa., E.	Utah
Ark., W.	Ind., N.	Mont.	Pa., M.	Wash., E.
Calif., S.	Ind., S.	Neb.	Pa., W.	W.Va., N.
Colo.	Iowa, N.	N.H.	S.C., E.	W.Va., S.
Dist.of Col.	Kan.	N.C., M.	S.C., W.	Wyo.
Fla., N.	Ky., W.	N.C., W.	S.D.	C.Z.
Ga., N.	La., W.	N.D.	Tenn., W.	Guam
Hawaii	Me.	Ohio, N.		

MATTERS

Civil

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

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Telephone Company Charged With Violating Section 7 of Clayton Act. United States v. General Telephone & Electronics Corporation, et. al., (S.D. N.Y.). D.J. File 60-0-37-228. On June 19, 1964, a civil complaint was filed in New York City against General Telephone & Electronics Corp., Western Utilities Corp., California Water & Telephone Co., West Coast Telephone Co. and Southwestern States Telephone Co. The complaint charged that General Telephone's proposed acquisitions of the capital stock of Western Utilities, a holding company, and its three affiliated telephone operating companies, would, if consummated, violate Section 7 of the Clayton Act.

On June 22, Chief Judge Ryan of the Southern District of New York entered a stipulated order permitting consummation of the mergers as scheduled, but requiring General Telephone to maintain each of the acquired telephone operating companies in a condition that will permit their disposition as going businesses should the Government prevail on the merits.

The complaint stated that 90% of the telephones in operation in the United States were owned by telephone operating companies of the General System and the Bell System at the beginning of 1963, while 10% were owned by approximately 2,810 independent telephone companies, including the three affiliates of Western Utilities which General Telephone proposes to acquire. General Telephone, the complaint alleged, has followed an aggressive policy of expansion through acquisition of independent telephone companies, and has also acquired substantial telephone equipment manufacturing facilities which furnish nearly all the requirements for such equipment of General System operating companies. The probable effects of the acquisitions, therefore, may be substantially to lessen competition in the manufacture, distribution and sale of products used in furnishing telephone services by foreclosing competitors of General Telephone and its subsidiaries from selling these products to the acquired companies, and by increasing concentration in the manufacture, distribution and sale of these products and in the furnishing of telephone services.

In 1962 total assets controlled by General Telephone amounted to more than $2.5 billion, the twelfth largest holding of assets among all industrial corporations in the United States. Total sales and revenues of the General System in 1962 were more than $1.3 billion, and consolidated net income in the same year for all its operations amounted to $86 million.

Staff: John M. Toohey, Robert J. Staal, Arthur I. Cantor and Lewis Gold (Antitrust Division)

Suspended Jail Sentence And Two Years Probation Imposed For Sherman Act Violations. United States v. M. Klahr, Inc., et al., (S.D. N.Y.). D.J. File 60-132-12. On June 18, 1964 Judge Harold R. Tyler denied in all respects the motion of John E. Pessolano, a union official, for a judgment of acquittal or, in the alternative, for a new trial, under Rules 29 and 33 of the Federal Rules of Criminal Procedure. Pessolano, who was the sole defendant to go to trial, was convicted by a jury on May 21 of violations of the Sherman Act (Counts 1 and 2) and the Taft-Hartley Act (Counts 15 through 23, Count 23 was dismissed at the trial on motion for an acquittal).

The major points of defendant's motion attacked the reservation by the trial judge of his motion for an acquittal at the close of the Government's case, relying on a line of cases originating with Jackson v. United States, 250 Fed 897 (1958), and sought an acquittal on the basis of insufficient evidence to convict beyond a reasonable doubt. Judge Tyler expressly relied from the bench on the Second Circuit decision of United States v. Goldstein, 168 Fed 666 (1948) in his refusal to follow the Jackson case. The Government cited the case of United States v. Wapnick, 202 F. Supp. 712 (1962) as setting forth the correct standard of "substantial evidence" for criminal cases.

The Court, by its ruling, also sustained the use by the jury of a Government prepared transcript of a Ninifon recording introduced as a Government exhibit, and rejected defendant's contention that the Government's failure to call to the stand Pessolano's co-defendants, who had pleaded nolo contendere to the charge of illegal payments to Pessolano, gave rise to a "presumption" that they would testify adversely to the Government.

After denying the motion, the judge sentenced defendant as follows:

> On all ten counts (Counts 1, 2 and 15 through 22): six months on each count to run concurrently, execution of prison sentences suspended; defendant placed on probation of 2 years.
>
> Defendant fined $1500 on Count 1 and $500 on each of the Counts 15 through 22 inclusive; total fine of $5,500 to be paid by July 31, 1964 or defendant to stand committed.

Staff: John J. Galgay, Richard L. Shanley, James J. Farrell and Lionel E. Bolin (Antitrust Division)

Maximum Fines Imposed And Suspended Jail Sentence For Robinson-Patman Violation. United States v. National Dairy Products Corporation and Raymond J. Wise., (W.D. Mo.). D.J. File 60-139-128. On June 22, 1964, Judge John W. Oliver of Kansas City, Missouri imposed maximum fines on defendant National Dairy Products Corporation of $50,000 on each of seven Sherman Act counts and maximum fines of $5,000 on each of six Robinson-Patman Act

counts. The Court also imposed fines on defendant Raymond J. Wise, a former National Dairy director and vice president, of $25,000 on each of two Sherman Act counts and $2,500 on a Robinson-Patman count on which he was convicted. Defendant Wise was given three months suspended sentence on the three counts against him, the sentences to run concurrently, and was placed on two years probation. The total fines imposed by the Court on defendant National Dairy are $380,000 and on the defendant Raymond J. Wise are $52,500. The fines levied on the corporation represent the largest amount ever imposed on any single antitrust defendant in one case.

Judge Oliver stated at the time of sentencing that he noted that much of the argument by defendants in connection with the sentencing concerned a belief on their part that there was a difference between an ordinary crime and a so-called "white collar" crime. The judge rejected this argument and stated that Congress recognized no such distinction in making the law, and that he did not believe that the courts should make such a distinction when Congress had refused to do so. Judge Oliver emphasized that a violation of the antitrust laws, in his opinion, should be viewed in the same judicial perspective as any other law. The Court further indicated that if the defendant Wise had not been 69 years of age and if his wife had not been in ill health, he might not have suspended the jail sentence.

This is the first jail sentence ever imposed on a Robinson-Patman Act violation. The court imposed the Robinson-Patman Act fines notwithstanding defense counsel's arguments that separate fines should not be levied upon the Robinson-Patman counts since said accounts embraced the same conduct covered in the Sherman Act counts.

Staff: Earl A. Jinkinson, James E. Mann, Robert L. Eisen, Raymond P. Hernacki, Thomas S. Howard, John T. Cusack and Howard L. Fink (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

ADMINISTRATIVE LAW--ADMINISTRATIVE PROCEDURE ACT

Court Holds Invalid the Debarment From Government Business of Person Pleading Guilty to Charge of Criminal Fraud; to Effect Such Debarment the Agency Was Required to Have Regulation Governing Debarment And Full-Scale Adversary Hearing. Gonzalez v. Freeman (C.A. D.C., May 7, 1964). Thomas P. Gonzalez and his sister Carmen were engaged in the business of importing and exporting agricultural products, through the Thomas P. Gonzalez Corporation and affiliated concerns. From 1951 through 1959 they purchased approximately $7 million worth of commodities from the Commodity Credit Corporation for export, and this business with CCC amounted to 30% of their total business.

In 1959 Thomas Gonzalez, acting for the Gonzalez Corporation, entered into a contract with the Anasae Corporation to supply it with beans to be shipped to Brazil. Gonzalez obtained "CCC sanitary certificates" on beans which he purchased from the CCC, showing that the beans had been inspected and were fit for human consumption. He then falsely represented to an agent of Anasae that they covered the beans which he was delivering to Anasae for shipment to Brazil. However, as Gonzalez knew, the beans which he delivered had not been inspected by an authorized Federal inspector. Rather, the beans which were shipped were in fact of inferior quality, were infested, and became unfit for human consumption.

CCC suspended the Gonzalezes from participating in any CCC program pending a Justice Department investigation of the matter. Gonzalez was subsequently indicted by a grand jury for violations of 18 U.S.C. 1001 and 15 U.S.C. 714, but the indictments were dismissed, and he pleaded guilty to a charge of fraudulently misusing the CCC certificates in violation of 7 U.S.C. 1622(h). After various consultations with the Gonzalezes' counsel, the CCC then debarred them from participating in any CCC programs for a period of five years. When they brought suit for judicial review of the debarment, the district court granted summary judgment in favor of the Government.

The court of appeals (per Burger, J.) reversed, holding (1) that a contractor has standing and a right of judicial review to challenge a determination to debar him from doing business with a Government agency; (2) that CCC had implied authority to debar irresponsible concerns from participation in its programs; but that (3) the debarment here was invalid and unlawful because (a) the Administrative Procedure Act requires that determinations of debarment cannot be left to a case by case determination, but requires a regulation setting forth the standards under which contractors would be debarred, and the procedures under which a determination would be made, and the CCC had no such regulation; and (b) "considerations of basic fairness" require a full scale administrative hearing, with notice opportunity to cross examine adverse witnesses, and findings on an administrative record.

The decision of the court of appeals appears to be in conflict, at least in result, with Commodity Credit Corporation v. Worthington, 263 F. 2d 178 (C.A. 4), certiorari denied, 359 U.S. 1012. Consideration is now being given to seek Supreme Court review of this case.

Staff: United States Attorney David C. Acheson and Assistant United States Attorneys Frank Q. Nebeker and Gerald A. Messerman (D. of Col.)

CORPORATE REORGANIZATION-BANKRUPTCY PRIORITIES

Government Entitled to Priority Under 31 U.S.C. 191 for Non-Tax Claims in Corporate Reorganization Proceeding Under Chapter X of the Bankruptcy Act. United States v. C. Gordon Anderson, Trustee (C.A. 5, June 8, 1964) D.J. File No. 61-18-71.

In the corporate reorganization proceedings of a shipping company, the United States filed non-tax claims in the total amount of $900,000, and asserted that these claims were entitled to priority under 31 U.S.C. §191. The district court denied priority to the non-tax claims, holding that the only Government claims entitled to priority in Chapter X proceedings were those for taxes and customs duties. The court treated the non-tax claims in the same manner as the claims of general creditors.

The court of appeals reversed, one judge dissenting, holding that all the government's non-tax claims were entitled to priority. Stating that the provisions of 31 U.S.C. § 191 should be given a liberal construction, the appellate court found no inconsistency between that statute and the purpose of Chapter X. The court specifically rejected the holding of the court below that the only priorities applicable to the United States in Chapter X proceedings were for tax and customs claims, following instead federal equity receivership precedents under which, the Government's right to priority under 31 U.S.C. 191 on all claims was clearly established in cases involving insolvent corporations.

The Fifth Circuit also rejected an alternate holding of the district court denying priority to the two largest non-tax claims on the additional theory that they arose out of debts not owed to the United States at the time the reorganization petition was filed. Subsequent to the date of the petition but before appointment of the trustee, the debts in question had been transferred or assigned to the United States. The court of appeals found it unnecessary to decide whether the claims were provable priority claims on the date of the petition, holding that the critical date was the date of the appointment of the trustee, and not the date the petition was filed. The court based this holding on 11 U.S.C. § 201, which provides that claims arising between the date of the petition and the appointment of a receiver or trustee shall be provable in a Chapter X reorganization.

Staff: William E. Gwatkin III (Civil Division)

FEDERAL TORT CLAIMS ACT

Recovery Under Federal Tort Claims Act Limited to Theory of Respondeat Superior. Merritt v. United States (C.A. 1, June 1, 1964) D.J. File No. 157-36-1008.

A house, leased by the United States from plaintiffs as family housing for military personnel and dependents, was destroyed by a fire negligently caused by an off-duty Army sergeant smoking in bed. Plaintiffs sued to recover their damages under the Federal Tort Claims Act. To escape the obvious legal conclusion that the sergeant was not acting in line of duty, i.e., within the scope of employment, plaintiffs contended that the Government as lessee of the property was absolutely liable to plaintiffs for permissive waste under the law of Massachusetts. Since an action for waste lies in tort in Massachusetts, plaintiffs contended their claim was cognizable under the Act.

In affirming the district court's judgment dismissing the complaint, the First Circuit ruled that the sergeant was not acting in line of duty when he caused the fire. Rejecting plaintiffs' argument that the Government was liable for waste, the court held that the Federal Tort Claims Act provides for a waiver of the Government's immunity only for loss "caused by the negligent or wrongful act or omission of any employee . . . while acting within the scope of his office or employment," 28 U.S.C. 1346(b). Accordingly, the court of appeals ruled that the Government's tort liability is limited to that based on "fault attributable on ordinary agency principles. Whether plaintiff has a contractual claim under the lease is not before us."

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

Where AEC Had No Statutory or Contract Duty to Supervise Safety Procedures of Independent Contractors, the United States is not Liable for Injuries to Employees. Jane A. Blaber, Admx., et al. v. United States (C.A. 2, May 28, 1964) D.J. File No. 157-52-555.

These actions were commenced under the Tort Claims Act to recover for death and personal injuries sustained by employees of Sylvania Corning Nuclear Corporation, Inc., in an explosion which occurred at Sylvania's laboratory in the performance of a research and development contract for AEC. The district court made extensive findings of fact from which it concluded, among other things, that Sylvania was an independent contractor, that the project was under Sylvania's managerial responsibility and control, and that AEC was under no duty to supervise the work or to promulgate safety rules and regulations; and it dismissed the complaints.

The Court of Appeals affirmed. It held that (1) AEC had no statutory or contract duty to supervise and protect against manufacturing or experimental hazards of the independent contractor, and while it had considerable power to control the activities of the contractor, the extent to which it would exercise such power was a "discretionary function" under the decision in Dalehite

v. United States, 346 U.S. 15; (2) the extent of AEC's undertaking to oversee safety procedures was a question of fact, which the district court found adversely to appellants, and Indian Towing v. United States, 350 U.S. 61, was not applicable; and (3) if there was negligence, it was the negligence of the independent contractor. The case is particularly noteworthy for its holding that the Indian Towing case and Rayonier, Inc. v. United States, 352 U.S. 315, "did enlarge the scope of the United States' liability as it might have been thought to exist after Dalehite, but they did not affect the scope of the discretionary function immunity."

Staff: United States Attorney Joseph P. Hoey and
Assistant United States Attorney Jerome C. Ditore
(E.D. New York)

GOVERNMENT CONTRACTS

Under Contract Expressly Disclaiming any Guarantees that it Would Furnish Necessary Equipment by a Date Certain, Government Not Liable for Damages Caused by its Delay in Furnishing Equipment Needed by Contractor in Time to Complete by the Contract Deadline. United States v. Croft-Mullins Electric Company, Inc. (C.A. 5, No. 21,116, June 19, 1964) D.J. File No. 78-19M-15.

Croft-Mullins entered into a standard form contract with the Navy to rehabilitate airfield lighting at the Pensacola Naval Air Station. The contract called for certain of the cables and fixtures to be used to be furnished by the Government, although no time was specified within which these items were to be supplied. The contract required the contractor to complete the work by a given date, and recited that this deadline was "based upon the expectation that the Government-furnished property . . . will be delivered . . . in sufficient time to enable the contractor to perform within the time for completion of the contract work." The Government failed to deliver this equipment in time to meet the contractor's deadline, which was consequently extended.

The district court found that the Government's delay in furnishing the items was due to negligence. The lower court assessed as damages to the contractor the difference between its actual cost of completing the job and what its cost would have been had the Government delivered the equipment in sufficient time to permit completion of the work in accordance with the planned schedule.

The court of appeals reversed, stating that the Government had no obligation to meet any schedule in its deliveries of equipment in view of the express contract provision that the Government "does not warrant or guaranty any time or times for delivery of such property." The court stated that it did not reach the question of the effect of further language in the contract exculpating the Government for liability for any delay in delivery of equipment. On this basis, the court stated that it was avoiding conflict with Ozark Dam Constructors v. United States, 127 F. Supp. 187 (Ct. Cl.), in which such an exculpatory clause was held not to relieve the Government for liability

for gross negligence in failing to deliver equipment on time.

Staff: Robert V. Zener (Civil Division)

PACKERS AND STOCKYARDS ACT

Secretary of Agriculture Has the Power under the Packers and Stockyards Act To Require Market Agencies and Dealers to Post Bond as a Condition to Registration and Doing Business. United States v. Wehrheim, (C.A. 8, No. 17490, June 9, 1964) D.J. File No. 58-27-9.

Under Section 304 of the Packers and Stockyards Act, 7 U.S.C. 203, the Secretary of Agriculture may require "market agencies" and "dealers" (i.e., Stockyard Commission Merchants) to register with him "in such manner as the Secretary may prescribe." Under 7 U.S.C. 204, the Secretary may require such market agencies and dealers to post bonds for the protection of their customers. 7 U.S.C. 203 provides a civil penalty for doing business as a market agency or dealer without registration. 7 U.S.C. 204 provides that insolvency or any violation of the Packers and Stockyards Act is ground for suspension of registration. The Secretary's regulations require that market agencies and dealers register before doing business, and that the bond be filed concurrently with the application for registration.

After filing an application for registration but without posting the required bond, Wehrheim operated a market agency. This action was brought to collect the civil penalty, under 7 U.S.C. 203, for failing to register. Wehrheim's defense was that 7 U.S.C. 204 provided the only penalty for doing business without a bond, which was available only after prior notice and hearing. It was also argued that the regulation requiring the posting of a bond "concurrently with" the registration form did not make the bond an unambiguous condition of registration, and that the "ambiguity" should be resolved against imposition of a penalty.

The Eighth Circuit reversed a lower court decision for Wehrheim, accepting the government's argument that the Act gave the Secretary power to require a bond as a condition precedent to registration and doing business. It rejected the defendant's arguments as defeating the purpose of the Act, because it meant that a market agency or dealer in open violation of the law would be able to do business with impunity while administrative proceedings under 7 U.S.C. 204 took place for suspension of his registration for failure to post a bond.

Staff: Robert V. Zener (Civil Division)

SOCIAL SECURITY ACT--MATERIAL PARTICIPATION

Substantial Contribution of Cash, Credit or Supplies by Landlord Constitutes "Material Participation" Qualifying Share-Crop Rental Income for Social Security Credit. Celebrezze v. Miller; Celebrezze v. Joubert, (C.A. 5, Nos. 20879 and 20880, June 18, 1964) D.J. File No. 137-33-20 and 137-33-23.

These cases involved the question of whether sharecrop rental income constitutes "self-employment income" to a landlord for purposes of old-age insurance credit under Section 211(a) of the Social Security Act, 42 U.S.C. 411(a). The statutory requirement is that there be "material participation" by the landlord in the production of crops, or in the management of production, under an agreement between the landlord and tenant calling for such participation. The Government argued that, in these cases, the facts showed only that the landlords were required to share expenses, and that income arising solely from financial contributions is not the type of income for which old-age insurance is designed, since the ability of the wage earner to collect income from his capital does not diminish with advancing age.

The Fifth Circuit affirmed judgments of the lower courts which had held that material participation had been shown, on the sole ground that contribution of "substantial amounts of cash, credit or supplies" made the sharecrop arrangement more like a joint business rather than a traditional landlord-tenant relationship. The court thereby indicated agreement with Henderson v. Flemming, 283 F. 2d 882 (C.A. 5), and impliedly rejected a dictum in Celebrezze v. Maxwell, 315 F. 2d 727 (C.A. 5), which supported the Government's position.

Staff: Robert V. Zener (Civil Division)

VETERANS ADMINISTRATION

District Court Lacks Jurisdiction to Review An Order of Veterans Administration Terminating Pension Benefits for Fraud. Milliken v. Gleason, etc. (C.A. 1, May 21, 1964) D.J. File No. 151-66-124.

The Veterans Administration ordered the plaintiff's pension forfeited for reasons of fraud. Plaintiff brought this action in the district court seeking declaratory judgment that her pension rights had been improperly discontinued. She alleged that the Veterans Administration had improperly applied the law to her case, and that she was "deprived of her constitutional and civil rights" by the illegal seizure and use of evidence against her and by the intimidation and forceful assault upon her by an agent of the Veterans Administration. The court of appeals affirmed the district court's dismissal of the complaint.

The First Circuit stated that, although cast in the form of an action of declaratory judgment, the suit was obviously one to review and set aside an order of the Veterans Administration terminating pension benefits. The court went on to rule that such a suit is clearly barred by 38 U.S.C. 211(a), which provides that ". . . decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." The court of appeals concluded by noting that Veterans benefits of the type here involved are gratuities, establish no vested rights in the recipients, and may be withdrawn by Congress at any time and under such conditions as Congress may impose.

Staff: Alan S. Rosenthal and J. F. Bishop (Civil Division)

DISTRICT COURTS

FEDERAL TORT CLAIMS ACT--SONIC BOOM DAMAGE

Government Not Liable for Sonic Boom Damage Absent a Showing of Negligence in the Operation of the Aircraft. Harold Brown et ux. v. United States. (D. Mass., June 12, 1964) D.J. File No. 157-36-890.

Plaintiffs, after rejecting an administrative settlement of $78.00, brought suit under the Tort Claims Act alleging damage to their home in the amount of $6,754 as a result of recurring sonic booms. The Government admitted that its agents were operating aircraft in the general vicinity of plaintiffs' residence on one of the dates in question. It was further admitted that a "sonic boom" in fact occurred and that it broke several windows in plaintiffs' home causing damage in the amount of $78.00.

The District Court for the District of Massachusetts rendered judgment in favor of the Government on the ground that there was no showing of any negligence on the part of the Air Force pilot. The court refused to apply the doctrine of res ipsa loquitur. Relying on Dalehite v. United States, 346 U.S. 15, 44-45, the court held that the Federal Tort Claims Act does not render the United States an insurer for damage caused by its agents.

Alternatively, the court held that even if res ipsa loquitur were applicable to a sonic boom case, plaintiffs here had failed to show that the alleged plaster and ceiling damage was caused by a sonic boom.

Staff: United States Attorney W. Arthur Garrity, Jr., and Assistant United States Attorney Paul F. Markham (D. Mass.)

LABOR--MANAGEMENT REPORTING AND DISCLOSURE ACT

Person Convicted of Conspiracy to Obstruct Interstate Commerce by Extortion Barred From Holding Union Office for Five Years. Peter Postma v. Local 294, International Brotherhood of Teamsters, and Attorney General Kennedy. (No. 9649, N.D. N.Y., May 8, 1964) D.J. File No. 156-50-50.

Peter Postma was convicted under the Hobbs Act, 18 U.S.C. 1951, for "conspiracy to obstruct interstate commerce by extortion." On May 8,1964, the United States District Court for the Northern District of New York ruled that this conviction barred him, under Section 504 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 504, from holding union office in Local 294 of the International Brotherhood of Teamsters for a period of five years.

Section 504 enumerates certain criminal offenses and provides that any person convicted of any one of them is disqualified from holding office as stated above. Included among these offenses is "extortion or conspiracy to commit same." While the crime for which Postma was convicted was literally neither extortion nor conspiracy to commit extortion, the Court held that the latter "* * * was an essential element of the crime * * *" for which he was

convicted, and was included therein. In short, the Court decided that the elements of "conspiracy to commit extortion" were necessarily included within a conviction for "conspiracy to obstruct interstate commerce by extortion," and that the ban of Section 504 therefore applied.

In so ruling, the Court rejected Postma's argument that Section 504 was a "penal" statute that should be strictly construed, and found that the statute was "remedial" in that its aim was to "* * * check the unlawful action of labor organization officials who must establish their trustworthiness by a five year ban from participating in certain positions of labor-management affairs."

Plaintiff has noted an appeal to the Second Circuit.

Staff: United States Attorney Justin J. Mahoney (N.D. N.Y.); Harland F. Leathers, Howard E. Shapiro and Charles Donnenfeld (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

GOLD VIOLATIONS

Removal of Restrictions on Acquisition and Holding of U.S. Gold Certificates Issued Before January 30, 1964. Through regulations filed with the Federal Register on April 24 (effective April 25), 1964, (Federal Register, Vol. 29, No. 82, pp. 5556-5557) the Secretary of the Treasury removed all restrictions on the acquisition and holding of gold certificates which were issued by the United States prior to January 30, 1934. Restrictions on the holding of other types of gold certificates, and the status of the special series gold certificates issued by the Treasury only to the Federal Reserve system, remain in force. For general instructions, see United States Attorneys Manual, Title 2, pages 73-74.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

Prohibition Against Certain Persons Holding Office (29 U.S.C. 504). United States v. Jack Priore, et al. (E.D. N.Y., June 12, 1964). Defendant Priore was convicted of a violation of Section 504(a) of LMRDA on an indictment charging that within five years after "conviction for conspiracy to commit extortion" he served as an organizer for a labor union. On February 6, 1959, Priore had been convicted of conspiracy under Section 580 of the Penal Law of the State of New York, on the plea of guilty to the first count of the indictment. The Court had charged that one Jack Priore ". . . did wilfully, knowingly, and corruptly conspire . . . to commit a crime, to wit, the crime of extortion."

Against the contentions (1) that Section 504 does not disqualify persons convicted of a misdemeanor from holding office, and (2) that defendant Priore was convicted of the crime of conspiracy and not conspiracy to extort as defined by the statute, Judge Mishler concluded that (1) persons convicted of any of the enumerated crimes in Section 504(a) are ineligible whether such crimes be classified as a misdemeanor or felony, and (2) that reference to the indictment makes it abundantly clear that defendant Priore was convicted of conspiracy to commit the crime of extortion.

In construing the enumerated crimes of Section 504 as referring to both felonies and misdemeanors, the Court noted that the section itself speaks of disqualification of persons convicted of misdemeanors in proscribing employment by a labor organization of persons convicted of violations of Title II or III of the Act, which violations are misdemeanors. To the objection that under the Court's construction of the statute one convicted of a misdemeanor might be penalized by curtailment of work opportunity while another convicted of a felony might not be so handicapped, Judge Mishler noted that "The answer to this anomaly lies in the varying classifications by the different states for criminal behavior."

The Court went on to point out that under defendant's interpretation of Section 504--that conviction of conspiracy is not a disqualifying crime under the Act--the phrase "or conspiracy to commit any such crimes" in Section 504 would have limited application, since at the time of the enactment of LMRDA the crime of conspiracy to commit the crime of extortion was not on the statute books of any state. "The interpretation that will result in a rational scheme and give dimension to the purging action of the Section 504," said the Court, "is one which includes convictions obtained under the conspiracy statutes of the several states, upon proof the conspiracy was entered into to commit the crime of extortion or any of the other crimes referred to. Singer v. U. S., 1945, 323 U.S. 338, 341, 65 S. Ct. 282, 284."

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Martin Pollner (E.D. N.Y.)

BOMB HOAX

Indictment Charging Violation of 18 U.S.C. 35(a) by Imparting Knowingly False Information Concerning Alleged Attempt to Do Act Prohibited by 18 U.S.C. 32 Need Not Allege Intent to Damage Aircraft. United States v. Rutherford (C.A. 2, May 27, 1964). D.J. File 95-52-84. The Second Circuit has extended its holding in United States v. Allen, 317 F. 2d 777 (1963), under former Section 18 U.S.C. 35 to an indictment under 18 U.S.C. 35(a), which does not require a wilful imparting of information. The indictment in the instant case alleged in part that appellant "imparted and conveyed the false information that he then and there had a bomb, which information concerned an attempt to do an act which would be a crime prohibited by Title 18, U.S.C. section 32, and which information the defendant knew to be false."

Appellant contended that the indictment was defective because it omitted an essential element of the crime - an allegation that the alleged attempt to do the act prohibited by 18 U.S.C. 32 was done with the intent to damage or destroy the aircraft which the false information concerned. The Court rejected this argument with the statement:

> We fail to understand why there is more need for alleging intent of the saboteur in a case where willfulness of the informer is no part of the crime than where the informer's willfulness is a necessary element. We hold that this court's decision in the Allen case is applicable here and we adhere to it.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Jerome C. Ditore (E.D. N.Y.)

AVIATION ACT

Crime Aboard Aircraft; Interference With Flight Crew Member. Robert Mims v. United States (C.A. 10, June 9, 1964). D.J. File 88-60-15. This is the first appellate opinion involving a conviction under 49 U.S.C. 1472(j), which prohibits anyone, while aboard an aircraft in flight in air commerce, from assaulting, intimidating or threatening any flight crew member so as to interfere with the performance by such member of his duties.

Defendant was a passenger in a private airplane and in the course of the flight he opened the door of the airplane. Later, as the pilot was about to land, defendant assumed control of the plane by using the dual controls and started to climb. Moments later, after the pilot had regained control and the plane was at an altitude of 400 feet, defendant turned the ignition key off and put it in his pocket. Defendant did not touch, threaten, or attempt to force the pilot to do any act. His actions were characterized as those of a "crazy drunk".

The Court, in light of the Supreme Court's recent holding in United States v. Healy, 376 U.S. 75, 83, decided that a private aircraft is an "aircraft in flight in air commerce" and that a pilot is a "flight crew member" within the terms of the statute. The Court also upheld the sufficiency of the indictment although the indictment did not specify the acts constituting the alleged assault, threat, and intimidation, stating that "the species of assault, threat or intimidation is not an essential element of the offense charged here, and we do not think it requisite to the validity of this indictment that the Government specify the particular overt acts employed to consummate the offense".

Finally, the Court upheld the sufficiency of the evidence to support the verdict. Although the Court noted that the trial court's instructions were unchallenged, the case nonetheless appears to be authority for the position that a pilot can be threatened, assaulted, or intimidated, solely as a result of a defendant's interference with the operation of an airplane.

Staff: United States Attorney B. Andrew Potter; Assistant United States Attorney Jack R. Parr (W.D. Okla.)

THEFT AND FORGERY OF TREASURY CHECKS

Undesirability of General Sentences. John Benson, Jr. v. United States (C.A. 5, May 28, 1964). D.J. File 48-40-119. The Fifth Circuit vacated the sentence and remanded this case to the district court for correct resentencing. The case involved violations of 18 U.S.C. 495 and 1708 arising out of appellant's action in taking from the mails a United States Treasury check, forging the payee's endorsement thereon, and uttering and publishing the check bearing the forged endorsement. On February 12, 1962, after a plea of guilty to the indictment, appellant was given a "general sentence" of 15 years. The maximum sentences for the violations involved are count one (section 1708) 5 years; count two

(section 495) 10 years; and count three (section 495) 10 years-an aggregate of 25 years. On January 25, 1964, appellant moved the sentencing court under Rule 35 of the Federal Rules of Criminal Procedure to correct the sentence, which motion was denied on January 27, 1964. Appeal was filed.

In reaching its conclusion that the sentence imposed should be vacated and the case remanded for correct resentencing which would involve a specification of the particular sentence attributable to each count of the indictment, the Court of Appeals noted that it had long since held that a single sentence on two or more counts for a term within the aggregate was not illegal. The Court cited primarily, Granger v. United States, 275 F. 2d 127 (C.A. 5); Reed v. United States, 142 F. 2d 435 (C.A. 5); and Rodriguez v. United States, 261 F. 2d 128 (C.A. 5). The Court further noted that its position in the past paralleled that taken by other circuits on the point, and the more general holdings of this and other circuits that the reviewing court generally will not disturb a sentence within the maximum which could have been imposed.

The objection which the Court of Appeals noted to a sentence of this type was that it was not in the most desirable form and should preferably specify punishment as to each separate count and indicate whether the sentences were to be served consecutively or concurrently. The Court recognized that the practice of general sentencing, while permissible, was unsatisfactory and was becoming so frequent as to require re-examination. After a detailed analysis, the Court concluded that the general sentence by imposing unnecessary burdens on the judiciary interfered with the orderly administration of justice in both direct and collateral review proceedings and, in addition, impeded prison authorities in the performance of one of their primary tasks, the rehabilitation of the offender. In addition, the Court noted that the defendant was not apprised as to the relative gravity with which the district court viewed each offense with which he was charged and to which he pleaded guilty.

Since the Criminal Division recognizes the merit of the conclusion reached by the Fifth Circuit in the instant case, it is suggested that the United States Attorneys afford courteous and appropriate guidance to the courts in order to avoid general sentences in the cases they are handling in their districts.

BRIBERY

Admissibility of Tape Recording Obtained During Investigatory Stage; Testimony Regarding Solicitation of Bribe Admissible as Words Constituting Commission of Crime Itself. United States v. Beno, (C.A. 2, May 28, 1964). D.J. File 51-14-48. Defendant appealed from his conviction of soliciting and receiving a gratuity, a set of the Encyclopedia Britannica and a dictionary, with the intent that it influence an official decision in his capacity as an Internal Revenue Agent. The Court of Appeals affirmed the conviction.

At the trial of the case, a tape recording was played to the jury of an incriminating conversation between defendant and Charles Guinta, the one from whom the bribe was solicited. The conversation was obtained by means of a concealed tape recorder on the person of Charles Guinta, while the two were in the latter's office, and at a time when the Government was investigating the activities of the defendant to determine whether he was engaged in any wrongdoing. The tape was used by the Government to corroborate Guinta who had testified as to his recollection of the conversation. Defendant contended that Guinta's testimony concerning defendant's end of the conversation was an improper attempt to introduce "involuntary admissions" and that, the use of the recording itself at the trial violated his constitutional rights.

The court pointed out that what defendant may have said during the course of the conversation is not to be considered as an "admission" made after the commission of the offense but rather, as words constituting the commission of the crime of bribery itself. The court could find no reason to exclude this testimony and observed that indeed, "bribery statutes would have little meaning if a victim were not permitted to testify that he had been asked for a bribe."

Since the recorder was affixed to Guinta's person and the conversation recorded in his office, it was not obtained by means of physical intrusion as in Silverman v. United States, 365 U.S. 505 (1961), and was therefore admissible under the authority of Lopez v. United States, 373 U.S. 427 (1963).

It is interesting to note that since the instant case dealt with a recording obtained during the investigatory stage, and not post-indictment questioning of a defendant, Judge Kaufman found the recent decision of Massiah v. United States, ___U.S.___ (32 U.S. L. Week 4389, May 19, 1964) to be "wholly inapposite." In that case, the defendant had been indicted, had retained a lawyer and had entered his plea of not guilty. While defendant was free on bail, a federal agent, by pre-arrangement with a confederate of the defendant who had decided to cooperate with the Government, was permitted to overhear a conversation between defendant and his confederate through an electrical transmitting device wherein defendant made incriminating statements. The Government agent then testified at the trial as to what he had overheard. The Supreme Court held that under these circumstances the use of such testimony against defendant was in violation of his constitutional rights as guaranteed by the Sixth Amendment, that is, the right to counsel.

Staff: United States Attorney Robert C. Zampano
(D. Conn.)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Public Land; Oil and Gas Leases: Acreage Limitations; Validity of Regulation Including Acreage in Applications as Chargeable Acreage. Melvin A. Brown v. Udall, Secretary of the Interior (C.A. D.C. No. 18,274, June 18, 1964; D.J. File No. 90-1-18-576). For the period between 1954 and 1961, Section 27 of the Mineral Leasing Act (30 U.S.C. 184) provided that no individual could hold at one time oil or gas leases on the public domain exceeding 46,080 acres in any one State. In 1959, the Secretary of the Interior issued a regulation (43 C.F.R. 192.3) which provided that the foregoing acreage limitation includes acreage covered in applications and offers to lease, as well as leases actually issued. The regulation also provided that, when an applicant or offeror filed for a lease or leases on a quantity of acreage which, when added to the acreages in his existing leases, applications and offers, "causes him to exceed the acreage of limitation, the application or offer, or group of applications or offers, causing the excess holding, will be rejected in its entirety." Brown filed 30 applications in 1960 for leases on 35,600 acres. They were all rejected because those applications caused his chargeable acreage to exceed 46,080 acres in Wyoming.

Brown sued the Secretary, contending that the statutory acreage limitation on leases held by one person did not authorize the regulation which counted acreages in applications and offers as chargeable acreage. The district court upheld the Secretary.

On appeal by Brown, the Court of Appeals reversed. It held that the Secretary's ruling "is unjustified by the statute or the regulation" and that, under "what we hold is the proper interpretation of the Secretary's regulation," Brown could only be charged with acreage which he held under lease and with acreage for which he was the first qualified applicant. Thus, by eliminating acreage for which he was not the first qualified applicant, Brown's chargeable acreage was only 10,200 acres with the result that his applications for leases on 35,600 acres did not cause him to exceed the limit. It was the Government's position that Brown could become the first qualified applicant with respect to any of his lease applications, upon the disqualification of the applicant having an earlier priority -- an event which frequently occurs.

Staff: S. Billingsley Hill (Lands Division).

Condemnation: Trial Court Order Refusing to Stay Government's Right of Immediate Possession Held Final and Appealable; District Court Directed to Hear Experts on Dangers Involved in Continued Occupancy of Buildings. United States v. Certain Land in Manhattan (306 Broadway Realty Corp., et al.) (C.A. 2, June 2, 1964; D.J. File No. 33-33-966). In the process of site preparation for the new federal office building on the west side of Foley Square in New York City, examinations of adjoining buildings indicated there was lateral movement and settlement which in the view of the Government's experts posed a

serious danger to life, limb and property if all these buildings were not immediately vacated. The Government ceased its work at the site on April 22, 1964, and on April 30, filed its condemnation proceedings to take them. Upon the filing of the declaration of taking, the usual ex parte order of immediate possession was entered. Some of the tenants appeared in district court to oppose the Government's attempt to get immediate possession. From the order of the district court which refused to stay the order granting immediate possession, the tenants took an appeal.

The Court of Appeals granted the stay and remanded the case to district court for further hearings on the necessity of granting the Government immediate possession. The appellate court overruled the Government's argument that these orders were interlocutory and therefore not appealable. It held that such orders derive from 40 U.S.C. 258a which provides that "the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession." As such, the Court said, these orders are separate from and collateral to the rights asserted in the main condemnation action. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

The Court of Appeals examined the conflicting affidavits of the experts as to the danger involved in the continuing occupancy of the buildings. It noted the hardships on the tenants in having to move on such short notice, and the cost of $8,000 a day arising from the delay of the Government's project. The Court concluded that "on balance" the district court should proceed to hear and examine the expert witnesses of the parties and any public officers who are concerned with public safety and the conditions of buildings. The district court should further inquire into what, if any, "undertakings or other means of assurance may be feasible to save harmless the government, and any contractors or other interested parties, with respect to claims arising out of continued occupancy of the premises, so that such continued occupancy may be conditioned on terms reasonable to the government * * *."

Staff: A. Donald Mileur (Lands Division).

Judicial Review of Administrative Action: Jurisdiction; "Petition for Review" of Army's Approval of State Bridge Construction Filed in Court of Appeals Dismissed. Colberg, Inc. v. The Secretary of the Army, et al. (C.A. 9, No. 19259, June 1, 1964; D.J. File No. 90-1-4-106). The Department of the Army approved California's plan to construct a bridge over the navigable Stockton Channel with a clearance which allegedly would have an adverse effect on petitioner's ship building and repair operations. Review of that approval was attempted by the filing of a "petition for review" in the Ninth Circuit which was said to be authorized by Rule 34, C.A. 9, entitled "Review or Enforcement of Orders of Administrative Agencies, Boards, Commissions and Officers."

Without opinion, the Ninth Circuit granted the Secretary and the State's motion to dismiss. The Government argued that (1) neither Rule 34, C.A. 9, nor the General Bridge Act of 1946, 60 Stat. 847, as amended, 33 U.S.C. 525-534 (under which Army expressly acted) grants jurisdiction to the Court of

Appeals to review the action of Army; and (2) the provisions of Chapter 11 of Title 33, U.S.C., which do relate to judicial review in the Court of Appeals, are directed to Army's action as to tolls and bridge alteration costs, neither of which was involved here.

Staff: Assistant United States Attorney Charles Elmer Collett (N.D. Calif.); Raymond N. Zagone (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Court Decisions

Sufficiency of Complaint Charging Attempted Evasion of Income Tax in Violation of Section 7201, I.R.Code, 1954. Max Jaben v. United States (#17,566, C.A. 8, June 16, 1964). On April 15, 1963, a complaint following the model form (Form 1, p. 137, Trial of Criminal Income Tax Cases) was filed to toll the statute of limitations for the year 1956 in the above-captioned case. An indictment was thereafter returned. Defendant attacked the sufficiency of the complaint, in pre-trial motions to dismiss the related count, on the ground that it did not state facts constituting "probable cause" within the meaning of Giordenello v. United States, 357 U.S. 480. (The model form had been drawn to meet the requirements of that case.) The motions being denied, defendant pleaded nolo contendere to the questioned count and appealed from the ensuing judgment of conviction on the sole basis of the averred inadequacy of the complaint to toll the statute of limitations which would otherwise have barred the prosecution. The Court of Appeals affirmed the conviction after reviewing the complaint (which it incorporated in the opinion). In so ruling, the Court approved the form of the model complaint, and specifically rejected the rationale of the isolated decision of the court in Greenberg v. United States, 320 F. 2d 467 (C.A. 9, 1963), a case holding the model complaint to be insufficient. The model complaint has been approved in the Tenth Circuit, Sanseverino v. United States, 321 F. 2d 714 (C.A. 10), and has withstood attack in the W.D. of Missouri and S. D. of Indiana, United States v. Black, 216 F. Supp. 645 (W.D. Mo.); United States v. Scheetz, 224 F. Supp. 789 (S.D. Ind.). At this juncture, no court has followed the Greenberg decision, and that rationale has been rejected by each court considering it.

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

CIVIL TAX MATTERS
District Court Decisions

Injunction: Failure to Send Taxpayer Notice of Deficiency Sufficient Grounds For Injunctive Relief. B. T. and H. R. Farley v. Thomas E. Scanlon, District Director (E.D. N.Y., January 20, 1964). (CCH 64-1 USTC ¶9371). Taxpayers sued the District Director to enjoin him from seizing their property or levying on their wages in order to collect an income tax liability. The Director had assessed a $25 deficiency but had neglected to send taxpayer a notice of deficiency as required by §6212 of the 1954 Internal Revenue Code. The Court held that the ordinary rule against enjoining the collection of tax (§7421(a)) was inapplicable since §6213(a) authorizes an injunction where the taxpayer had not been given notice of the deficiency.

After the action was commenced, the Director advised the taxpayers that they were being credited with the amount theretofore sought to be collected.

Thereupon, the Court granted the Director's motion for a summary judgment on the grounds that the case had become moot. However, in view of the fact that it had taken an order to show cause and a restraining order to obtain relief, the taxpayers were permitted to recover their costs from the defendant-Director.

Staff: United States Attorney Joseph P. Hoey (E.D. N.Y.)

Statute of Limitations; Pendency of Tax Court Proceeding Operates to Suspend Statute of Limitations on Collection of Jeopardy Assessments; Res Judicata; Marshaling of Assets. United States v. Albert N. Shahadi, et al. (D. N.J., March 6, 1964). (CCH 64-1 USTC ¶9411). Jeopardy assessments were made against defendant, Shahadi. That defendant then sought redetermination of the deficiencies which were the basis of those jeopardy assessments. The Tax Court's decision, which had become final, upheld those deficiencies. In this subsequent suit to foreclose the liens arising from the jeopardy assessments, defendant contended that the commencement of this suit, being after six years from the assessment date, was barred by the statute of limitations on collection. The Court held that 1939 IRC §277 operates to suspend the running of the statute in this instance even though the Government might have administratively collected on the jeopardy assessments during the pendency of the Tax Court proceeding. Further, the Tax Court decision is res judicata in this lien foreclosure action. Marshaling of assets was denied the Government, which would have forced a bank, a prior lienholder, to resort to entireties property for its satisfaction, leaving other liened property available for satisfaction of tax liens.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Herbert Jacobs (D. N.J.); and Arnold Miller (Tax Division)

State Court Decision

Insolvent Estate; Liens of United States Preferred to Liens of Other Claimants; Application of Section 3466, Revised Statutes. In re Application of Stiner, Administratrix (Surrogate's Court, Nassau County, N.Y.). This matter involved an insolvent estate whose only asset was the equity in some real property. After distributing an amount to satisfy the first mortgagee, the balance had to be distributed among the several claimants of the estate. The claimants were: (1) the United States with a tax liability assessed on July 5, 1955, and a second assessment made on September 20, 1960; (2) the Nassau County Department of Public Welfare holding a second mortgage recorded on July 2, 1956, for future advances; (3) the New York Industrial Commissioner with tax warrants filed on September 11, 1959, March 18, 1960, and July 1, 1960; and (4) the New York State Tax Commission with a warrant filed July 1, 1960.

The Surrogate's Court following a hearing on the disposition of the proceeds of the balance of the funds remaining after payment of the first mortgagee, awarded administration fees (including attorneys' fees), the first federal tax lien, and the amount advanced by the Nassau County Department of Public Welfare prior to receiving notice of the claim of the United States.

In rejecting the balance of the claim of the DPW, the Court held that the lien of the mortgage for advances will be postponed as to such advances made after knowledge of the existence of a subsequent lien.

As for the balance of the claims, the United States prevailed over all other claimants by virtue of Section 3466 of the Revised Statutes and Section 212 of the Surrogate's Act which expressly orders the payment of "debts entitled to a preference under the laws of the United States and the State of New York." Reading the two acts together, the Court awarded the balance of the funds to the United States. In re Reyhold's Will, 38 Misc. 2d 378; 235 N.Y.S. 2d 752; Matter of Henke, 193 Misc. 52, 81 N.Y.S. 2d 79; In re McCormack's Estate, 171 N.Y.S. 2d 642.

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

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