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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Commercial Bowling Proprietors Charged with Violation of Sections 1 And 2 of Sherman Act. United States v. Bowling Proprietors' Association of America, Inc. (S.D. N.Y.) D.J. File 60-277-19. On June 23, 1964, a civil suit was filed charging BPAA, a national trade association of bowling proprietors, and its affiliated associations, about 200 in number, with unlawful combination and conspiracy in restraint of, and to monopolize, interstate trade and commerce in the operation of commercial bowling establishments throughout the United States, in violation of Sections 1 and 2 of the Sherman Act.

These establishments are supported by open, league, and tournament bowling. Approximately 7 million persons engage in league bowling, which is organized bowling done under contract with an establishment for 32-36 weeks per year. League bowling accounts for more than 50% of total annual revenue realized by a commercial establishment. Tournament bowling is that done for prizes, and is confined almost exclusively to league bowlers. BPAA and its affiliated associations conduct the most popular and prestigious tournaments in the nation. In 1963, over one-half million league bowlers participated in BPAA tournaments.

BPAA members own or operate about 80% of the total number of commercial lanes in the nation. The gravamen of the offense charged is that BPAA and its affiliated associations adopted and enforced eligibility rules for their tournaments which required the league bowler to do this league bowling exclusively in a BPAA establishment. In 1963, after BPAA was aware of the Division's investigation of bowling eligibility rules, this rule was amended so as to exert less coercive pressure upon the bowler.

Staff: John J. Galgay, J. Paul McQueen, Bernard Mindich and Howard Breindel (Antitrust Division)

Jail Sentences to Be Served For Sherman Act Violations. United States v. The Brookman Co., Inc., et al., (N.D. Calif.) D.J. File 60-191-9. On June 25, 1964, three individual defendants and three corporate defendants [out of eight defendants], having pled nolo contendere on May 22, were sentenced to jail terms and fines by U.S. District Judge William T. Sweigert. The case remains pending as against two defendants.

Defendants were indicted on January 3, 1964, for fixing prices, submitting rigged bids and allocating jobs in the sale and installation of resilient floor coverings in the San Francisco Bay area.

On May 22 six defendants filed nolo pleas over the vigorous objection of Government counsel. Defendants argued, in support of their pleas, that the case was a small case, that a relatively small amount of interstate commerce

was involved, etc. The Government argued that the case nevertheless was an important case involving bid-rigging in the construction industry. The Court accepted defendants' pleas and directed counsel for defendants and Government to submit their reports and recommendations to the Probation Officer before June 19.

On June 19 Judge Sweigert, at the request of Government counsel, asked each defendant and his counsel whether he believed himself innocent of the charges, and if so, whether he did not desire to withdraw his plea of _nolo contendere_. He also asked whether the Government had made any promises or inducements to the defendants or if there had been any duress. On receiving a negative reply from each defendant and counsel, Judge Sweigert continued the hearing until June 25 for sentencing.

On June 25, prior to imposing sentence, Judge Sweigert again asked counsel whether the defendants had been induced to file their _nolo_ pleas as the result of any promises or inducements by the Government or duress. On again receiving a negative reply from each individual defendant and counsel, Judge Sweigert observed that the filing and acceptance of _nolo_ pleas had been thoroughly discussed at previous hearings and that counsel and defendants were aware of the consequences of such pleas.

Judge Sweigert thereupon commented briefly upon the information previously submitted to him by counsel for defendants and Government at the June 19th hearing. He noted that the conspiracy had been continuing and operating for some twelve or thirteen years; that it was a flagrant violation; that it involved price fixing, which every businessman knew violated the Sherman Antitrust Act; and that defendants were well aware of what they were doing.

The judge further commented that defendants had continued price fixing after the _General Electric_ cases had been given wide publicity. He said the defendants had been represented to him as exemplary businessmen with well established reputations in the community. However, the crimes with which they were charged are so-called "white collar" crimes and could not be differentiated from other federal violations. Consequently, he did not think the defendants should be treated differently from those who appeared before him in other federal cases.

Judge Sweigert then imposed the following sentences upon the three individual defendants and three corporate defendants:

1. J. A. Mancini - $5,000 and 90 days in jail to be served.
2. The Brookman Co., Inc. - $10,000
3. Albert W. Cobby - $2,000 and 30 days in jail to be served.
4. Peterson-Cobby Company - $5,000
5. Louis Akerstrom - $2,000 and 30 days in jail to be served.
6. Turner Resilient Floors, Inc. - $5,000

On June 29 defendants filed motions for a stay of execution of sentences; to withdraw pleas of nolo contendere and for reduction of sentence under Federal Rules of Criminal Procedure 32 (d) and 35. On June 30 the Government filed its brief in opposition to the motions.

On July 2, Judge Sweigert denied defendants' motions. The individual defendants immediately filed notices of appeal in the District Court, which have the effect of staying the service of jail sentences pending the outcome of the appeals.

Staff: Lyle L. Jones, Marquis L. Smith, William B. Richardson and Patrick M. Ryan (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

ADMIRALTY--STANDING TO SUE

Economic Competition Alone Insufficient to Give Standing to Challenge Alleged Illegal Administrative Action. The Pennsylvania Railroad Co., et al. v. C. Douglas Dillon, Secretary of the Treasury, et al., (C.A.D.C., June 26, 1964), DJ# 61-16-54. These actions were commenced by coastwise carriers, with railroads intervening, for declaratory judgments and injunctive relief challenging the action of the Commissioner of Customs in documenting certain vessels for operation by Sea-Land Services, Inc., in the coastwise trade. The documentation was alleged to be in violation of Section 27 of the Merchant Marine Act of 1920, 46 U.S.C. 883. That statute denied enrollment in the coastwise service to vessels rebuilt with foreign made midbodies, except as rebuilding was effected under contracts within the provisions of a saving clause. The carriers attacked the documentation as competing operators who suffered economic injury from such alleged illegal enrollment. The district court dismissed the complaints on the ground of "no standing."

The Court of Appeals affirmed. It noted that the tests for standing to review administrative action as found in Section 10(a) of the Administrative Procedure Act were the suffering of a "legal wrong," or being "adversely affected or aggrieved * * * within the meaning of any relevant statute." Further, the Court pointed out that appellants had no "legally protected right" to be free from economic competition, absent a showing of Congressional intent to bestow such a right, and that, similarly, their contention that they were "adversely affected or aggrieved" depended upon the Congressional purpose underlying the relevant sections of the Merchant Marine Act of 1920, as amended.

The Court of Appeals ruled that the broad Congressional purpose of such enactments was to encourage resort to domestic shipyards and was not intended to give coastwise service operators a legally protected right to be free from other domestic competition. Accordingly, the Court held that appellants had failed to show the necessary "statutory aid to standing."

Staff: Kathryn Baldwin (Civil Division).

ESTOPPEL OF GOVERNMENT

Summary Judgment for Government Not Proper Where There Was Possible Factual Basis for Holding That Government Was Estopped to Deny Plaintiff's Status As Permanent Employee. Semaan v. Mumford, Librarian of Congress (C.A.D.C., June 18, 1964), DJ# 35-16-228. Appellant was summarily dismissed from his position with the Library of Congress. He sought reinstatement on

grounds, inter alia, that the Library had failed to follow its own regulations governing the discharge of permanent employees and that, as a probationary employee, he could be discharged summarily.

The district court granted the Library's motion for summary judgment, but the Court of Appeals reversed. The appellate court ruled that appellant's allegations of having completed his one-year probationary period and of having been informed, by an oral statement and certain privileges accorded him, that he had been given permanent status, raised a factual question of estoppel of the Government. On this question, appellant was entitled to present evidence that he had achieved permanent employee status and was not to be barred by summary judgment.

Staff: United States Attorney David C. Acheson and Assistant United States Attorneys Frank Q. Nebeker, Robert D. Devlin and Mrs. Ellen Lee Park (D. D. Col.)

GOVERNMENT CONTRACTS

Federal Law Rather Than State Law Governs Enforceability of Disputes Clause in Private Subcontracts Executed Pursuant to Government Prime Contracts. United States v. Taylor (C.A. 5, June 22, 1964), DJ# 77-1048. This suit was brought by the United States to enforce a claim against a subcontractor assigned to it by its prime contractor, based on an award made by the Atomic Energy Commission's Board of Contract Appeals pursuant to the disputes clause contained in the subcontract. The district court held that the enforceability of the subcontract disputes clause was governed by state law and was invalid and unenforceable thereunder by reason of the subcontractor's withdrawl from the proceeding before the AEC Board of Contract Appeals prior to the rendition of its decision.

On appeal, the Fifth Circuit fully upheld the Government's contention that, pursuant to the doctrine of Clearfield Trust Co. v. United States, 318 U.S. 363, federal law rather than state law governs controversies arising out of private sub-contracts executed pursuant to Government prime contracts. This decision closely follows American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640 (C.A. 9), the only other reported decision on the point. Applying federal law, the Court held that the subcontractor was fully bound by the disputes clause of the subcontract, that it could not withdraw unilaterally from the proceedings commenced pursuant thereto, and that it was bound by the ultimate finding of the AEC Board of Contract Appeals, to whom the dispute was properly referred.

The Court of appeals thus reversed the judgment of the district court and remanded the case with directions to enter judgment for the United States for $337,973.52--the amount of the award rendered by the AEC Board of Contract Appeals.

Staff: Stephen B. Swartz (Civil Division).

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT-- STATUTE OF LIMITATIONS

Court Action for Louisiana Workmen's Compensation Benefits Suspends Running of Period of Limitations Applicable to Longshoremen's and Harbor Workers' Actions. T. Smith & Son v. Willie Wilson (C.A. 5, March 3, 1964), DJ# 83-32-73. Claimant, a longshoreman, was injured in the course of his employment while aboard a vessel afloat upon the navigable waters of the Mississippi River at the port of New Orleans. After his employer discontinued the payment of compensation benefits, he filed a suit in Louisiana state court for the payment of benefits under the Louisiana Workmen's Compensation Act. At the time suit was instituted, the lower Louisiana courts which had passed on the matter had held that a longshoreman injured while engaged in loading or unloading a vessel was entitled to benefits under the State Act, although the injury occurred on navigable waters. However, in April 1961 the Supreme Court of Louisiana ruled that such injuries were within the exclusive Federal maritime jurisdiction and therefore compensable only under the Longshoremen's Act.

Claimant filed a claim for benefits under the Longshoremen's Act within two weeks of that decision of the Louisiana Supreme Court, but more than a year after the receipt of the last voluntary compensation payment. The Deputy Commissioner denied the claim on the ground that it was barred under the one-year period of limitations contained in the Longshoremen's Act.

The district court reversed, holding that the suit for Louisiana Workmen's Compensation benefits was a suit at law for "damages" within the meaning of Section 13(d) of the Longshoremen's Act, 33 U.S.C. 913(d), and therefore the filing of the suit suspended the running of the period of limitations until recovery was denied, 218 F. Supp. 944.

Although the employer appealed, the Deputy Commissioner, whose order had been reversed did not. Rather, the Deputy Commissioner participated as an appellee, urging the correctness of the decision of the district court. The Court of Appeals affirmed that decision per curiam, for the reasons set forth in the district court's opinion. The employer's petition for a writ of certiorari is now pending in the Supreme Court, and will presumably be acted upon at the beginning of the Court's October Term, 1964.

Staff : David L. Rose (Civil Division).

NATIONAL BANK ACT

Comptroller of Currency Order Approving Establishment of Branch Bank on Basis of State Law as Interpreted by State Banking Authorities Upset. Union Savings Bank of Patchogue v. Saxon (C.A.D.C., June 25, 1964), DJ# 145-3-571. On March 15, 1962, the Tinker National Bank applied to the Comptroller of the Currency to open a branch office in an unincorporated area in the State of New York. The site was approximately 400 feet from the incorporated village of Patchogue. The Comptroller conducted the usual investigation concerning the legality and necessity of the branch. In the exercise of his authority

under 12 U.S.C. 36(c), and after considering the pertinent provisions of the Banking law and the Village law of the State of New York, and the objections of the appellants, the Comptroller approved the application and the branch bank was opened.

Appellants, competing banks located within the incorporated village of Patchogue, filed suit against the Comptroller to set his approval aside. They alleged that his approval and the establishment and operation of the new branch bank were in violation of the National Bank Act. The Tinker National Bank intervened as co-defendant.

Under the provisions of the National Bank Act (12 U.S.C. 36), with the Comptroller's approval, a national banking association may establish and operate branches only at such places as are expressly authorized for state banks under the law of the State in question. It was conceded that Section 105 of the New York Banking Law expressly authorizes state banks to establish a branch in an unincorporated village; that Section 2 of the New York Village Law provides that a territory not exceeding 3 square miles and with a population of no less than 500 people may be incorporated as a village; that the area involved in suit has less than 3 square miles and over 500 people; and that the New York banking authorities accept as an unincorporated village for purposes of branch banking an area which qualifies for incorporation as a village.

Appellants contended that the area involved is not a "village" because it lacks the characteristics of a "community" and therefore it is not an authorized location for a branch under State law, nor under the National Banking Act.

The Second Circuit reversed the district court's entry of summary judgment for the Comptroller and the Tinker National Bank. The appellate court held that a territory, which has the required area and population for incorporation as a village, does not by that reason alone qualify as an unincorporated village; and that an unincorporated area, in order to qualify as a site for a branch bank, must have some attributes of community life or interests. The Court rejected a contrary interpretation of New York law by the New York banking authorities.

Staff: Pauline B. Heller (Civil Division)

WALSH-HEALEY ACT

Wage Determination Under Walsh-Healey Act Set Aside; Refusal to Produce Information Supporting Bureau of Labor Statistics Wage Table Violative of Administrative Procedure Act; Members of Industry Affected by Wage Determination Have Standing to Sue if Labor Costs Will Rise or if Members Are Forced to Abandon Government Contracts. Wirtz v. Baldor Elec. Co. (C.A.D.C., December 31, 1963; supplemental opinion, June 29, 1964), DJ# 219-715-292. This was an action to set aside the Secretary of Labor's determination of the prevailing minimum wage in the electrical motors and generators industry. Upon its usual pledge of confidentiality, the Bureau of Labor Statistics gathered information regarding the payment of wages by members of the industry. From this information wage tables were prepared and were introduced in an administrative proceeding under Section 1(b) of the Walsh-Healey Act. The industry's trade association applied

to the Hearing Examiner for a subpoena duces tecum to examine the supporting information because the BLS survey was alleged to be inaccurate. The application was denied and the denial was upheld by the Secretary of Labor, who stated that disclosure would violate the pledge of confidentiality and would seriously impair the work of BLS.

When this case was originally considered by the Court of Appeals for the District of Columbia Circuit, that court set sside the wage determination, holding that (1) the refusal to divulge the underlying information violated Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 1006(c); (2) there was not substantial evidence to support the determination; and (3) that the District Court's injunction against application of the determination applied to the entire industry whether or not a class action was involved.

Upon remand of the case for a determination as to which, if any, of the plaintiffs had standing, the District Court found five plaintiffs to have standing because each had one or more "covered employees" to whom it would have to pay higher wages as a result of the Secretary's "prevailing minimum wage determination."

The Court of Appeals, in a supplemental opinion, affirmed the District Court's determination as to standing, ruling that injury to plaintiffs is equally cognizable whether reflected in increased labor costs under Government contracts or in the decision of a company to abandon Government contracting because of the higher labor costs. The Court also rejected the Secretary's proposals to supplement the record with regard to the determination of the prevailing minimum wage. The Court ruled that the proposals did not afford the plaintiffs sufficient opportunity to cross-examine the sources of the supplemental material since the Secretary planned to release from the pledge of confidentiality only summary data from undisclosed sources.

Staff: United States Attorney David C. Acheson and Assistant United States Attorneys Charles T. Duncan, Frank Q. Nebeker and Gil Zimmerman (D. Col.).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

SUBCHAPTER XV, SOCIAL SECURITY ACT
42 U.S.C. 1361 et seq.

TEMPORARY UNEMPLOYMENT COMPENSATION ACT OF 1958, as amended
42 U.S.C. 1400a et seq.

AREA REDEVELOPMENT ACT
42 U.S.C. 2501 et seq.

MANPOWER DEVELOPMENT AND TRAINING ACT OF 1962
42 U.S.C. 2571 et seq.

In the April 25, 1958 issue of the Bulletin (Vol. 6, No. 9, p. 236) the Criminal Division detailed the modified agreement between the Department of Justice and the Department of Labor concerning the prosecution of cases involving apparent fraud in the securing of unemployment compensation benefits by (1) veterans under Title IV of the Veterans Readjustment Assistance Act of 1952 and (2) Federal employees under Subchapter XV of the Social Security Act. Specifically, the modified agreement provided that, except in certain minor instances, state agencies shall not be required to refer veteran and Federal employee compensation cases to the Federal Bureau of Investigation where the alleged overpayment does not exceed $104.

By mutual agreement between the Criminal Division and the Department of Labor, the referral procedure has been further modified to increase the cut-off figure to $300. In addition, it has been agreed that the provisions of the agreement should be made applicable to the improper receipt of training benefits pursuant to the Area Redevelopment Act, 42 U.S.C. 2501 et seq., and the Manpower Development and Training Act of 1962, 42 U.S.C. 2571 et seq.

Accordingly, under the modified agreement, the state agencies shall not be required to refer veteran unemployment compensation cases, Federal employee unemployment compensation cases, and cases involving the improper receipt of training benefits under the Area Redevelopment Act or the Manpower Development and Training Act of 1962, where the alleged overpayment does not exceed $300, except where there are factors which, in the judgment of the state agency, suggest that the matter be referred for Federal action. All other cases, including those falling within the above exception, must be referred by the state agencies to the FBI for investigation. In these cases, the Criminal Division has recognized the right and privilege of the Department of Labor to bring to our attention, for appropriate review, any case in which the United States Attorney has declined prosecution, where the Department of Labor feels such action to be warranted by the particular circumstances of the individual case.

Because of the increase in the cut-off amount, only the more flagrant cases will be referred to the FBI by the state agencies. We urge all United States Attorneys to prosecute a representative number of these violations which action will punish the offender and serve as a deterrent to like conduct by others.

For your information, prosecution of Federal employees who wrongfully obtain unemployment compensation is instituted under 42 U.S.C. 1368; similarly, pursuant to 42 U.S.C. 1371, ex-servicemen who wrongfully receive unemployment compensation benefits are prosecuted under that section. Prosecutions under the Temporary Unemployment Compensation programs are initiated under 42 U.S.C. 1400s. The obtaining of fraudulent training allowances under the Area Redevelopment Act is prosecuted under 42 U.S.C. 2515. Since the Manpower Development and Training Act of 1962 contains no criminal provisions, the obtaining of fraudulent training allowances under the Act is prosecuted under 18 U.S.C. 1001.

VENUE

False Statements to Influence Farm Credit Administration (18 U.S.C. 1014). United States v. Elmer Ruehrup (C.A. 7, June 24, 1964). D.J. File 106-25-98. Defendant was convicted in the Southern District of Illinois under an information charging violations of 18 U.S.C. 1014 for the submission of false statements for the purpose of influencing the action of an agency of the Farm Credit Administration.

Upon appeal, defendant contended, inter alia, that the District Court committed reversible error by denying his motions for acquittal due to improper venue, urging that since the alleged false statements were submitted to the St. Louis Bank of Cooperatives in St. Louis, Missouri, and since the offense proscribed in 18 U.S.C. 1014 is the delivery or communication of the false statement, venue was properly only in St. Louis, Missouri, citing Travis v. United States, 364 U.S. 631.

The Court of Appeals affirmed the conviction. It accepted the position of the Tenth Circuit that Travis is not controlling in this situation, and is limited to the statute there involved. Imperial Meat Company v. United States, 316 F. 2d 435, 440 (C.A. 10, 1963). Pointing out that 18 U.S.C. 3237(a) is controlling, the Court held that the preparation of the statements in Illinois and their deposit in the mail for transmission to St. Louis constituted the beginning of the offenses charged, which offenses were completed when the statements were received by the bank, citing De Rosier v. United States, 218 F. 2d 420, 422 (C.A. 5, 1955), cert. denied 349 U.S. 921.

Staff: United States Attorney Edward R. Phelps; Assistant United States Attorney Leon G. Scroggins (S.D. Ill.)

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

NATURALIZATION

Reenlistment Subsequent to Military Service Qualifies Alien For Naturalization. United States v. Rolando Reyes Convento (C.A. D.C., No. 17805, July 7, 1964) D.J. File 39-16-493.

Appellee, an alien, enlisted in the United States Navy in the Philippine Islands in 1953 and served continuously until 1957 when he reenlisted in San Diego, California. The District Court held that he was eligible for naturalization under the provisions of 8 U.S.C. 1440(a) as an alien who had served honorably in active duty status in the naval forces of the United States and who at the time of enlistment or induction was in the United States. The Government appealed claiming that the statute contemplates that the enlistment or induction must immediately precede the qualifying military service.

By per curiam decision the judgment of the District Court was affirmed. Circuit Judge Burger voted to affirm on the basis of the opinion of District Judge Hart, 210 F. Supp. 265. Chief Judge Bazelon voted to affirm for the reasons stated in his opinion. He felt that the statute should not be read restrictively to bar appellee from naturalization unless it was expressly commanded. He rejected the Government's argument that the words of the statute literally read and against the background of legislative history required appellee's exclusion, stating that while syntax might better be preserved by adopting the Government's argument, the words of the statute did not compel it.

Circuit Judge Danaher wrote a dissent in which he concluded that the policy of Congress was so thoroughly established and its purpose so clear that he could find no basis for holding in favor of the appellee.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Frank Q. Nebeker and Max Frescoln.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy, Misuse of Passport and Unlawful Departure From United States. United States v. Morris and Mollie Block (E.D. N.Y.) D.J. File 146-1-51-2696. On July 10, 1959, a ten-count indictment was returned against Morris Block and his wife, Mollie. Defendants were charged in Count I with conspiracy to violate Sections 1542 and 1544 of Title 18, and Section 1185(b) of Title 8, United States Code. Morris Block was charged in the other nine counts of the indictment with the substantive violation of these three statutes in that he attempted to use and did use a passport, the issue of which was secured for the use of another (1544) and by reason of false statements (1542), and in that he attempted to depart from the United States without a valid passport (8 U.S.C. 1185(b)). Defendants having previously departed from the United States for the Soviet Union on June 22, 1959, the indictment was sealed at the request of the Government.

Defendants returned to the United States on June 11, 1964 and were arrested in New York on June 17, 1964. They were brought before Judge Matthew T. Abruzzo who assigned the Legal Aid Society to represent them. Mollie Block was released on her own recognizance and Morris on $1000 bail. Arraigned before Judge Abruzzo on June 25, 1964, they pleaded not guilty, and the case was adjourned to September 9, 1964.

Staff: United States Attorney Joseph P. Hoey (E.D. N.Y.); John H. Davitt, Roger P. Bernique (Internal Security Division)

Labor Management Reporting and Disclosure Act of 1952; Provision of 28 U.S.C. 504 Relating to Members of Communist Party Held Unconstitutional. United States v. Archie Brown (C.A. 9, N.D. Calif.) D.J. File 146-7-4166. In 1961 Archie Brown was indicted in San Francisco, California, on the charge that from 1959 to date of the indictment he had served as a member of the Executive Board of Local No. 10 of the International Longshoremen and Warehousemen Union while at the same time being a member of the Communist Party. This was the first case brought under that provision of Section 504, which also bars from certain union offices those persons who have been convicted of certain criminal offenses, such as extortion.

Brown was convicted by a jury on April 5, 1962, and his appeal originally was heard by a 3-judge panel of the Court of Appeals on February 4, 1963. Following oral argument the Court of Appeals, *sua sponte*, set the case for reargument before the Court sitting *en banc* on December 12, 1963.

On June 19, 1964 the Court by a vote of 5-3 ordered the judgment set aside and the indictment dismissed. The reasoning of the majority in the *Brown* case was that the provision of Section 504, relating to members of the Communist Party is unconstitutional because the Act does not require a showing of a threat in fact to interstate commerce by the person to be punished, and the prohibition impermissibly imputes guilt merely on the basis of a person's associations and without proof of a specific intent. Thus, the Court held,

making a criminal offense the act of being a member of the Communist Party while at the same time holding an office in a labor union is a "direct" restraint on First Amendment activity, and is distinguishable from the "indirect" restraint of former section 9(h) of the Taft-Hartley Act, the constitutionality of which was upheld in American Communications Association v. Dowds, 339 U.S. 382. Section 9(h) required that an officer of a labor union must file with the N.L.R.B. an affidavit of non-membership in the Communist Party or else the union was deprived of privileges before the N.L.R.B.; but union officership by a member of the Party was not a criminal act.

Staff: Original argument and reargument by United States Attorney Cecil F. Poole (N.D. Calif.)

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LANDS DIVISION

Ramsey Clark, Assistant Attorney General

Appeals; Finality of Order, Mandamus, Authority to Take, Only Issue of Just Compensation Can Be Referred to Rule 71A Commissions. United States v. 91.69 Acres of Land in Oconee County, Sourth Carolina (Excelsior Mills) (C.A. 4, June 24, 1964) Dept. File No. 33-42-239-885. The United States condemned land in fee. The owners objected on the ground that only a flowage easement was needed. The district court referred this question to a commission along with the issue of compensation. Upon appeal or alternatively a petition for mandamus, the Court of Appeals determined the reference to a commission a nonfinal and, hence, a nonappealable order and denied mandamus, but pointed out that a challenge to the validity of a taking "is in no event one for the Commission," since its function is limited to finding the value of the land proposed to be taken. The Court further held that "no circumstances are suggested here that would warrant a departure from this well extablished rule," i.e., the broad rule of Shoemaker v. United States and Berman v. Parker, that the extent of private property to be taken is a legislative and not a judicial question. The Court referred to the case of "arbitrary, capricious, or corrupt conduct" of an official as a "theoretically conceivable" exception.

Staff: Edmund B. Clark (Lands Division).

Surveys and Resurveys; Where Resurvey Was Made to Correct Erroneous Original Survey, Location of Patented Land Is Governed by Original Survey; Trespass; Government Entitled to Treble Damages Under Sec. 3346, Cal.Civ.Code, For Wilful Trespass. United States v. Carl Vollweiler, et al. (N.D. Cal., June 10, 1964) D.J. File No. 90-1-11-1063. This action was filed against a trespasser for the recovery of damages for a wilful trespass pursuant to sec. 3346 of the California Civil Code. In 1904, a patent was issued to one Sherman describing his land as located by the survey of 1884 in Section 11, Township 18 North, Range 3 East. The original survey was cancelled and a resurvey was made and accepted in 1942, which located and segregated the Sherman land as Tract No. 42, lying in Sections 9 and 10, rather than Section 11. Vollweiler purchased the timber cutting rights on Tract No. 42 from the successors in interest of the original patentee. Although he had notice of the two land descriptions and the fact that his grantors claimed title to Tract No. 42 under the original Sherman patent, Vollweiler proceeded to log the timber from national forest land in Section 11 belonging to the United States. The Court held that the land actually logged was the property of the United States. The Court further held that the removal of the timber was wilful and malicious in that it was committed with reckless and wanton disregard of and indifference to the rights of the United States, for which it was entitled to recover treble damages.

Staff: Assistant United States Attorney Rodney H. Hamblin (N.D. Calif.)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decisions

Enforcement of Internal Revenue Summons; Defense That Its Use Is in Furtherance of Criminal Investigation Held Invalid as Matter of Law. Fred D. Siegel v. Clifford E. Tyson, Jr., Special Agent (C.A. 5, No. 20865; May 15, 1964). In a recent number of the Bulletin (Vol. 12, No. 10, p. 255), we noted that the Fifth Circuit had rejected the argument that an Internal Revenue Service summons is invalid when issued in support of an investigation which may lead to a criminal prosecution. On May 15, 1964, the Court of Appeals handed down the following brief opinion:

> PER CURIAM: As announced from the bench during oral argument, the appeal is without merit and the judgment is AFFIRMED. The stay is thereby vacated. The mandate shall issue forthwith.

The fact that the Court directed its mandate to issue forthwith clearly indicates that it felt that the argument was frivolous.

Staff: Burton Berkley and Joseph M. Howard (Tax Division)

District Court Decision

Internal Revenue Summons: Pre-indictment Proceeding For Return And Suppression of Seized Property May Be Brought Under Style of Civil Complaint Even Though No Criminal Action Commenced. Donald R. Lord and Bernard G. McGarry, Sr. v. Alvin M. Kelley, Robert J. Calhoun, John B. Flattery, Charles R. McNally, and Donald Young, (D.Mass., Nov. 19, 1963). CCH 64-1 U.S.T.C., ¶9378). In this action, Judge C. E. Wyzanski, Jr., ordered that certain records be returned to plaintiffs, Donald R. Lord, an accountant, and Bernard A. McGarry, Sr., his client, who was the owner of the records. The order also enjoined the defendant District Director and his agents from using "in any proceeding, criminal, civil or administrative, federal or state, any information or clues derived from examining such records," although the United States was not precluded from requiring production of these records under proper process, presumably under the provisions of Section 7602 I.R.C. 1954.

The Court found that the Special Agent investigating McGarry's liability had exercised unlawful pressure against Lord, which resulted in Lord's turning over of McGarry's records. The pressure, which Judge Wyzanski concluded was close to extortion, related to the Agent telling Lord that unless he turned over his clients' records and cooperated with the Internal Revenue Service, he (Lord) would be in trouble. The Agent had called upon the accountant armed with a summons which directed production of the same records which were subsequently produced pursuant to the agents "demand." The Court expressed the view that the summons should have been served upon the accountant and it should

have called for compliance no sooner than 10 days from service thereof as provided by Section 7605(a), since the accountant was not authorized to voluntarily turn over his clients' records.

The relief granted was based upon what the Court found to be an unreasonable search and seizure which violated McGarry's rights under the Fourth Amendment. The instant decision extends the application of Rule 41(e), F.R. Crim. P., to a civil suit notwithstanding the provisions of Rule 1 which seems to limit the scope of the Federal Rules of Criminal Procedure to criminal actions. It is important to note, however, that under this decision the evidence is not forever suppressed since it may still be subjected to production under the requirements of a valid Internal Revenue summons. Plaintiff has appealed the decision contending that the evidence should be forever suppressed.

Staff: United States Attorney W. Arthur Garrity, Jr., and Assistant United States Attorney Murray H. Falk (D. Mass.).

CRIMINAL TAX MATTERS
District Court Decision

Conviction of Attorney for Wilful Attempted Evasion of Payment of Income Taxes of Clients Under 26 U.S.C. 7201: Attorney, Who Prepared Returns for Clients and Collected Their Tax Payments Under Promise to File Returns and Pay Over Taxes, Failed to File Returns and Diverted Tax Monies to His Own Use; District Court Disagreed with Seventh Circuit Decision in Mesheski Case. In United States v. Charles L. O. Edwards (D. Ore., June 24, 1964), defendant, after a bench trial, was convicted on 16 counts charging wilful attempted evasion of payment of income taxes of clients (26 U.S.C. 7201), five counts charging wilfully assisting in and procuring the preparation and filing of false and fraudulent income tax returns for clients (26 U.S.C. 7206(2)), and three counts charging wilful failure to file individual income tax returns for himself (26 U.S.C. 7203).

With respect to the Section 7201 counts, the defendant, a practicing attorney for some 25 years, prepared many income tax returns for clients, collected the taxes due as shown by the returns, and promised the clients that he would send both the returns and the money to the District Director of Internal Revenue. He did not file the returns, and he diverted to his own use the monies submitted to him by the clients for payment of their taxes. Edwards told some of the clients that he had filed the returns and paid the taxes, and he led all of them to believe he had done so. He also made false statements to agents of the Internal Revenue Service in an effort to prevent them from discovering the fraud. The Court (Judge Solomon), finding that defendant intended to cheat not only his clients, by embezzling their money, but also the Government by evading his clients' taxes, disagreed with the decision of the Seventh Circuit in United States v. Mesheski, 286 F. 2d 345, the relevant facts of which the Court found to be almost identical to the facts in the Edwards case. Specifically, Judge Solomon disagreed with the Seventh Circuit's conclusion in Mesheski that "defendant's reprehensible

actions, designed to hinder detection of the strictly local crime of embezzlement, do not constitute such affirmative conduct as clearly and reasonably infers a motive to evade or defeat tax."

The Government, in seeking the further testing of the issues involved in the Mesheski case, which it believes was decided erroneously, emphasized that the affirmative actions and representations of Edwards, directed chiefly to the taxpayer clients, brought his conduct within the purview of language in Spies v. United States, 317 U.S. 492, 499, and other decisions of the courts under 26 U.S.C. 7201.

Judge Solomon has stated that he intends to have his opinion published. In the event an appeal is taken, affirmance by the Ninth Circuit would create a conflict between two circuits which could provide a basis for ultimate review by the Supreme Court of issues presented by the two cases.

Staff: Acting United States Attorney Sidney I. Lezak; Assistant United States Attorneys Charles H. Habernigg and Donal D. Sullivan (D. Ore.); James D. O'Brien (Tax Division)

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