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ADMINISTRATIVE DIVISION

Assistant Attorney General for Administration S. A. Andretta

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 24, Vol. 12 dated November 27, 1964:

MEMOS	DATED	DISTRIBUTION	SUBJECT
386	11-16-64	U.S. Attorneys & Marshals	Requests for execution of letters rogatory & other forms of international judicial assistance: Public Law 88-619, 78 stat. 995, approved Oct. 3, 1964.
387	11-18-64	U.S. Attorneys	Delegation of authority to U.S. Attys. to compromise & close civil claims under supervision of Lands Division.
388	11-16-64	U.S. Attorneys	Redelegation of authority to U.S. Attys. to act in connection with & to compromise Lands Div. direct-reference cases.
389	11-16-64	U.S. Attorneys	Redelegation of authority to U.S. Attys. to compromise condemnation cases.
390	11-24-64	U.S. Attorneys	Redelegation of authority to release right of redemption.
391	10-7-64	U.S. Attorneys	Redelegation of authority to release rights of redemption in certain cases.

MEMOS (Cont.)	DATED	DISTRIBUTION	SUBJECT
392	11-18-64	U.S. Attorneys	Public Law 88-519, 88th Cong. (H.R. 11520, 78 stat. 699, approved August 30, 1964)
393	11-19-64	U.S. Attorneys & Marshals	Excess personal property reporting.
366-S1	11-16-64	U.S. Attorneys	Reducing backlog of civil cases.

ORDERS	DATED	DISTRIBUTION	SUBJECT
327-64	11-24-64	U.S. Attorneys & Marshals	Designating Asst. Atty. Gen. for Administration to perform duties of Attorney General under Military Personnel & Civilian Employees' Claims Act of 1964.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Government Charges Violation Of Section 7 Of Clayton Act In. United States v. Abbott Laboratories, et al., (N.D. Ill.) D.J. No. 60-0-37-817. On December 8, 1964, a complaint was filed under Section 7 of the Clayton Act in the United States District Court at Chicago alleging that the proposed merger of Abbott Laboratories and Nuclear-Chicago Corporation may substantially lessen competition and tend to create a monopoly in the production and sale of nuclear instruments, radiopharmaceuticals and radiochemicals. The case was assigned to the Honorable Michael L. Igoe.

To bar consummation of the merger then scheduled for December 14, 1964, plaintiff's motion for a temporary restraining order was filed on December 9, 1964. However, after a conference among counsel, an order was entered by Judge Igoe with the consent of the parties, providing: (1) for the hearing of plaintiff's motion for a temporary restraining order on December 23, 1964; (2) that consummation of the merger would not take place prior to December 31, 1964; (3) that counsel for the parties would meet to discuss "procedural matters" on December 22, 1964; (4) that plaintiff would file its motion for a preliminary injunction together with supporting papers on or before December 22, 1964, "unless arrangements made on that date make filing unnecessary;" (5) that plaintiff's motion for a preliminary injunction will either be heard prior to December 31, 1964 or consummation of the merger will again be deferred until such time as the motion can be heard.

Abbott is the fourth largest ethical pharmaceutical company in the country and the leading producer of radiopharmaceuticals (drugs containing radioactivity) with almost 50% of the total industry sales of approximately $5 million. Abbott's net sales during 1963 exceeded $195 million and its total assets as of June 30, 1964, exceeded $200 million. Nuclear-Chicago, with net sales of approximately $17.7 million in its fiscal year 1964 and with assets of approximately $13 million as of August 31, 1964, is the leading manufacturer and seller of nuclear instruments. It has approximately 26% of total sales in this industry which has grown at the annual rate of 22% since 1957 and in which total sales during 1964 will exceed $60 million. Nuclear-Chicago is also the second largest seller of radiochemicals (chemicals containing radioactivity) with over 10% of total industry sales of approximately $5 million.

Radiopharmaceuticals are used both clinically (for diagnosis and therapy) and for research in the life sciences. Radiochemicals are not generally used clinically since they are not drugs, but are used for research in the life and physical sciences, and they have extensive potential industrial applications. The users of radiopharmaceuticals (generally, hospitals and research laboratories) as well as the users of radiochemicals (generally, university and other research laboratories) must also purchase and use nuclear instruments in order to detect, analyze and measure the intensity of the nuclear radiation contained within the drugs and chemicals.

Each of these three industries is highly concentrated. Abbott, the Squibb Division of Olin Mathieson, and Volk Radiochemical Co. have over 95% of total industry sales of radiopharmaceuticals while Nuclear-Chicago and its leading competitor have over 60% of total industry sales of radiochemicals. Nuclear-Chicago and its three leading competitors have approximately 60% of nuclear instrument industry sales.

If the merger were consummated, Nuclear-Chicago would acquire access to the enormous financial and other resources of Abbott which would give it a decisive competitive advantage over its small competitors in the nuclear instrument and radiochemicals industries. Furthermore, by gaining access to Abbott's vast sales and service organization with recognized "expertise" in dealing with hospitals and clinics, Nuclear-Chicago would acquire decisive advantages over its competitors in selling instruments to those persons and institutions presently reached by Abbott. Both Abbott and Nuclear-Chicago would acquire competitive advantages over their rivals by their post-merger ability to sell nuclear instruments and radiopharmaceuticals simultaneously, and, possibly, in "packages." The result would be to foster other mergers and, ultimately, to destroy the independent, competitive, growing nuclear instrument industry.

Staff: Jerome A. Hochberg, John F. Graybeal and Patricia M. Lines (Antitrust Division)

Aluminum Company Required To Divest Itself Of Assets In Cupples Products Corporation. United States v. Aluminum Company of America, et al., (E.D. Mo.) D.J. No. 60-0-37-371. The District Court has ordered the Aluminum Company of America to divest itself not only of all the assets represented by the stock acquired from Cupples Products Corporation but also of the new plant built after the acquisition, owned by Alcoa but operated by Cupples. This plant is located at Corona, California.

In its decision of September 22, 1964, following a trial on the merits, the court held that "Alcoa will be ordered to divest itself of the stock of Cupples", but it reserved until further hearing its decision with respect to the Corona plant. A hearing on "the proper method and the scope of the divestiture" was held on October 23, 1964, at which time the court granted defendants' request for a further hearing with respect to disposition of the Corona facility. That hearing was held on November 23 and 24, 1964.

Defendants' evidence at this hearing was directed principally toward showing that (1) no special technology is involved in building an aluminum fabricating plant and (2) that Alcoa could use the Corona plant for fabricating other products than those made there by Cupples. They pointed out that in no reported decisions of the courts or the FTC had the acquiring company been required to divest itself of after-acquired property.

The Government's evidence went toward establishing that (1) the Corona plant had been planned and built specifically by Cupples and (2) retention of the plant by Alcoa would not eliminate the anticompetitive tendencies found by the court to exist in Alcoa's acquisition of Cupples. The Government cited

United States v. du Pont, 366 U.S. 316 (1961), for the proposition that the only appropriate test is whether or not the relief is adequate to redress the violation and urged that Alcoa should not be allowed to retain the fruits of its violation of Section 7.

Under the final judgment entered by the court on December 4, 1964, Alcoa is required within one year to divest itself of (1) the Corona facility and (2) all interest in Cupples. Alcoa is required to submit a detailed plan for divestiture within 60 days, after which the Government will have 30 days within which to object.

At the October 23 hearing, defense counsel advised the court that if Alcoa were not required to divest itself of the Corona facility, no appeal would be taken, but if divestiture of Corona were ordered, Alcoa would appeal both on the merits and on the relief ordered.

Staff: Edna Lingreen, Joe E. Waters, James F. Buckley, Lionel Epstein and Wm. D. Kilgore, Jr. (Antitrust Division)

Court Holds For Government In. United States v. Grinnell Corporation, et al. (D. R.I.) D.J. No. 60-339-1. On November 27, 1964, Judge Charles E. Wyzanski, Jr., filed an opinion, findings of fact, conclusions of law and a final judgment, holding that defendants Grinnell Corporation (Grinnell), American District Telegraph Company (ADT), Holmes Electric Protective Company (Holmes) and the Automatic Fire Alarm Company of Delaware (AFA) had violated Sections 1 and 2 of the Sherman Act.

The complaint, filed on April 13, 1961, charged the Grinnell Corporation, and its affiliates ADT, Holmes and AFA, with unreasonably restraining trade in violation of Section 1 of the Act, and engaging in a conspiracy to monopolize, an attempt to monopolize and actual monopolization of the central station protection service business in the United States in violation of Section 2 of the Act.

The trial commenced on June 15, 1964, after extensive pre-trial discovery, including 128 depositions (totalling over 8,000 pages), answers to several hundred interrogatories, production of thousands of documents, five stipulations (totalling 58 pages) and pre-trial briefs totalling more than 400 pages. The Government's case, which consisted of only 316 exhibits and excerpts from 38 depositions, was introduced into evidence during the first hour of trial. The defendants introduced their defense, consisting of documentary evidence, depositions and oral testimony of 31 witnesses, in six days. The trial was completed on June 24, 1964. Post-trial briefs were filed on September 11, 1964, and final arguments were held on October 9, 1964.

The Government contended, inter alia, that the defendants achieved monopoly power through (1) Agreements executed between and among the defendants, then unaffiliated corporate entities, between the period 1900-1949. These agreements provided for the complete allocation of geographic areas and classes of customers throughout the United States, as well as price fixing; (2) Acquisition of competitors and potential competitors including agreements with former

owners of the acquired companies not to re-enter the central station protection business for extended periods of time or forever, and often without geographical limitation. (Following many of these acquisitions, the defendants dismantled the business facilities of the acquired companies); (3) Discriminatory pricing practices, including greatly reduced rates and free installation of alarm systems whenever necessary to prevent a competitor from obtaining a valuable account; and charging prices in excess of the standard rate in areas where competition did not exist; (4) Entering into allocation agreements with competitors and potential competitors; (5) Threatening and persuading actual and potential competitors not to enter or to discontinue the business of central station protection service; (6) Anticipation and infiltration of the central station protection service market to preclude competitors from entering the market; (7) Retaining title to protection systems installed on the customers' premises to preclude competitive effort; (8) Contracting to furnish protection service for unjustifiably long periods of time to block competitive effort; (9) Submitting successively lower bids to block competitive effort; (10) Reducing prices on contract renewals to the degree necessary to preclude competition; and finally (11) that Grinnell, by acquiring its theretofore unaffiliated co-conspirators in the early 1950's cemented completely the defendants' monopolistic position. At the time of the filing of the complaint, the Grinnell-controlled companies enjoyed 87 per cent of the central station protection service business in the United States.

The defendants, for the most part, limited their defense to the questions of relevant market and lack of interstate commerce, contending that a broad "property protection service" market exists, encompassing all types of electrical protection systems, watchmen and even watchdogs. As to interstate commerce, the defendants contend that central station protection service is confined to areas within a radius of 25 miles of the central supervising station, and is therefore a local or intrastate operation.

The court held that central station protection service constitutes a clearly identifiable relevant market, and that the defendants had, through clear violations of Sections 1 and 2 of the Sherman Act, achieved and preserved a monopolistic position in this market. The court further held that "the patterns in which the industry has developed, the market has a national interstate-commerce character."

Judge Wyzanski's opinion is particularly significant in at least three respects. First, he advances theory of "monopolization" under Section 2 of the Act, applying what might be termed a <u>per se</u> rule: That is, ". . . once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of §2." Hence, the Government need not prove "defendants' predatory tactics . . . or defendant's pricing, or production, or selling, or leasing, or marketing;" the burden is shifted completely to the defendant to show that this dominant position was thrust upon him.

Second, the court developed a new method of rate and pricing disclosure designed to prevent the defendants from manipulating prices so as to bring against competitors defendants' monopolistic power. With respect to this disclosure, the court ordered:

> ". . . . Defendants shall, until further Order of the Court, file with the Antitrust Division of the Department of Justice such standard lists of prices and terms of sale or servicing as, at its uncontrolled pleasure, it from time to time adopts, and also to file a record of every quotation, written or oral, department from those standard lists, such filings to reach the Division within two weeks of the quotation."

And third, the court also applied an entirely new theory with respect to relief in civil antitrust cases. The decree provides that the defendant corporations are perpetually enjoined from hereafter employing the President of the Grinnell Corporation, Mr. James D. Fleming, "who for nearly three decades has been the effective leader of the course of unlawful conduct, and, therefore cannot be trusted to head the reform imposed by this decree."

This injunctive provision is directed only toward the corporate defendants; for James Fleming is not named as an individual defendant. With respect to Mr. Fleming's conduct the court further stated:

> "2. This is no border-line case. A man of the capacity, sophistication, and, possibly, risk-taking temperament of Mr. Fleming cannot have been ignorant that the companies he controlled had in the most flagrant way violated the clearest aspects, and so-called per se rules, of the Sherman Act and were continuing to follow patterns conceived in crime. Maybe he shrewdly weighed business advantage against business disadvantage, and with keen appraising eye estimated the law's delays, the fluctuating policies of the Department of Justice, the improbability of private suitors with adequate funds and resolution, the reluctance of courts to apply surgical measures to cut deep into already established industrial patterns, and, in any event, the plausibility of the oft-cited, if strangely inapt, metaphor that one cannot unscramble eggs.
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> . . . to insure that the reforms imposed by this decree are not thwarted by a leader of great capacity but of less than an admirable record of compliance with well-known prescriptions of antitrust law, and to guarantee that there is an entirely effective

> breaking-up of the Channels of restraint and monopolization which the present management of Grinnell has dug so deep into the pattern of the accredited CSPS industry, and to make certain that the general public is not further prejudiced by the continued management of defendants by one who has demonstrated defiance of their prohibitions, no defendant, after April 1, 1966, shall continue in employment as officer, director, employee, consultant, agent, or otherwise James Douglas Fleming . . . ."

The court further ordered that the defendants shall be enjoined from further acquisitions or restraints of trade and that defendant Grinnell divest itself of all stock ownership in defendants ADT, Holmes and AFA.

Staff: Noel E. Story, Hugh P. Morrison, Jr., and Ernest T. Hays (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

ADMIRALTY

Charterer's Net losses Held To Be Carried Back and Offset Against Earlier Profits in Determining "Cumulative New Voyage Profits." American President Lines, Ltd., et al. v. United States, et al. (C.A. 9, No. 19105, decided November 27, 1964). D.J. No. 61-11-1019. The sole issue in this cross appeal was whether the net losses incurred by the American President Lines during the years 1953 through 1955 could be carried back and offset against earlier profits (from 1948 through 1952) in determining "cumulative net voyage profits" due the United States as "additional charter hire" under a bare-boat charter in effect from 1944-1955. The court of appeals reversed the judgment of the district court on this issue, holding that the carryback of losses was proper, citing as authority United States v. Moore-McCormack Line, 308 F. 2d 866 (C.A. 4), certiorari denied, 372 U.S. 944.

Staff: Lawrence F. Ledebur (Civil Division).

FEDERAL EMPLOYEE DISCHARGE

Second Circuit Upholds Lower Court's Dismissal of the Actions Brought by Former Federal Employee Seeking Redress for Wrongs Allegedly Committed Against Her During Her Period of Employment. Mary Kessler v. General Services Administration, et al. (C.A. 2, Nos. 28947-48, decided November 24, 1964). D.J. Nos. 145-171-54 and 55. Appellant, acting pro se, instituted several actions in the district court, complaining of a reduction of civil service grade in 1958, a 10 day suspension in 1962, adverse performance ratings in 1962 and 1963, and the discharge from the General Services Administration in 1963. In addition, she sought to enjoin the defendants from making allegedly libelous statements and from interfering with her work. She also sought $1,000,000 in tort damages. The district court found each claim to be without merit.

The court of appeals affirmed, holding that (1) the 1958 reduction in grade was barred by laches; (2) she had failed to exhaust the administrative remedies available to her in connection with the adverse performance ratings and the discharge; (3) the lower court had no jurisdiction over her tort claim since GSA and the Civil Service Commission may not be sued and the United States is not liable for the torts alleged.

Staff: United States Attorney Robert M. Morgenthau, Assistant United States Attorney Alan G. Blumberg (S.D. N.Y.).

FEDERAL TORT CLAIMS ACT

"Check Pilot: of Air Force Aero Club Airplane Held Not To Be an Employee of the Club and Hence Not an Employee of the United States Within the Meaning of the Tort Claims Act. Brucker v. United States (C.A. 9, No. 18,828, November 18, 1964). D.J. No. 157-12-894. A flying club was organized and operated as an instrumentality of the United States to give authorized personnel of the Air Force the opportunity to fly during off duty hours, for their recreation, and

in order to encourage the development of aeronautical skills. The plaintiff, a member of the Club, was injured in the crash of a Club airplane piloted by another member of the Club. The crash occurred during the off duty hours of both men. The district court ruled that the crash was caused by the negligence of Lieutenant Hammack, the pilot Club member, but that he was not acting as an agent or employee of the United States. The court of appeals affirmed, noting that the question of whether a person is an employee of the Federal Government under the Tort Claims Act is a question of federal law and that the term "employee" in the Act has the same general meaning as the term "servant" in the body of common-law rules concerning respondeat superior liability.

Following the Tenth Circuit's ruling in United States v. Hamline, 315 F. 2d 153 (1963), certiorari denied 375 U.S. 895, the court also ruled that "liability could not be imposed upon the United States for acts of persons not its servants simply because the government encouraged the activity and derived benefit from it."

Staff: David L. Rose (Civil Division).

Ample Evidence To Support Lower Court's Causation Finding Adverse to the United States; Lower Court Erred, However, With Respect to Interest Awarded Against United States. United States v. Wells and Thompson (C.A. 5, No. 21173, decided October 19, 1964). D.J. Nos. 157-76-213, 157-76-214. Extensive property damage to a filling station and an adjacent restaurant resulted from a fire which occurred in the course of an attempt to drain gasoline from a military vehicle into the pit of the service station wash rack. The district court found that the property damage was proximately caused by the negligence on the part of military personnel and awarded judgment against the United States. The court of appeals affirmed, but modified the judgment "to provide interest from the date of filing of the transcript of the judgment in the General Accounting Office to the date of the mandate of affirmance as required by . . . . 31 U.S.C.A. §724a (Supp. 1963)." The appellees had conceded that the lower court had committed a technical error in this respect. The Fifth Circuit thus joins several other courts (e.g. United States v. Mississippi Valley Barge Line, 285 F. 2d 381 (C.A. 8)) that have held 31 U.S.C. 724a to modify 28 U.S.C. 2411(b) as far as interest awards against the Government are concerned.

Staff: United States Attorney Ernest Morgan, Assistant United States Attorney William O. Murray, Jr. (W.D. Texas).

GOVERNMENT CONTRACTS

Second Circuit Upholds Denial of Government's Breach of Contract Action on Basis of Jury's Answer to Certain Interrogatories. United States v. Joseph Bertman d/b/a Bertman Food Products (C.A. 2, No. 28784, decided October 26, 1964). D.J. No. 77-57-596. This action was for a breach of contract seeking to recover $45,000 paid to defendant for 14,700 cans of imported tomato paste. The tomato paste had been delivered in April or May 1951 and, in the summer of that year, it was destroyed as unfit for consumption under court order. The Government relied primarily upon a clause in the contract which provided that the contractor will compensate the United States for "losses sustained by the Government through damage, deterioration, or spoilage of subsistence stores

during a stated period." The district court submitted interrogatories to the jury and upon receiving the jury's answer, entered judgment for the defendant.

The court of appeals affirmed, relying primarily upon the jury's negative answer to the court's interrogatory. With respect to the Government's contention on appeal that the question was improper, the court noted that the trial court had advised counsel of the form of the question and counsel had made no objection thereto. Moreover, the Government had stated in the court below that were the jury to return a negative answer that would be the end of the litigation.

Staff: United States Attorney Robert M. Morgenthau, Assistant United States Attorneys (David E. Montgomery and Eugene B. Anderson (S.D. N.Y.).

MANDAMUS

Capitol Architect Was Within Statutory Authority in Denying Contract to Lowest Bidders; Mandamus Action Denial Upheld. United States ex rel. Brookfield Construction Co. and Baylor Construction Co. v. J. George Stewart (C.A. D.C., No. 18932, decided November 25, 1964). D.J. No. 145-0-238. Two contractors brought an action to compel the Architect of the Capitol to award them a construction contract on the ground that their joint bid had been the lowest submitted. The district court found that the Architect was within his statutory right in rejecting the bid and that, as the action was in reality one against the United States, it was barred by the sovereign immunity doctrine. The court of appeals affirmed per curiam, stating that in light of Larson v. Domestic & Foreign Corp., 337 U.S. 682 and Malone v. Bowdoin, 369 U.S. 643, it was constrained to uphold the lower court.

Staff: United States Attorney David C. Acheson, Assistant United States Attorneys Frank Q. Nebeker and Alan Kay (D. D.C.).

SOCIAL SECURITY ACT

Eighth Circuit Holds That It Was Error for District Court To Substitute Its Judgment for Secretary on Question of Claimant's Disability; Availability of Light Work Which Secretary Found Claimant Could Perform Is Not An Issue. Celebrezze v. Harry M. Sutton (C.A. 8, No. 17,626, decided November 20, 1964). D.J. No. 137-25-43. In this Social Security disability case, the claimant, a 60-year old male with two years of college education and a vocational background of both white collar and manual work, sought disability benefits based on a back impairment, certain genito-urinary diseases and extreme nervousness. The Secretary of Health, Education and Welfare found that claimant's physical impairments did not prevent him from engaging in substantial gainful employment. The district court, in reversing the Secretary's determination, held that there was no substantial evidence in the record to support the Secretary, but that, even if there were, there was no showing that the claimant would be able to obtain such employment, considering his physical condition.

The Eighth Circuit reversed the district court following a careful review of the medical evidence, which was practically without conflict that the claimant was physically able to perform work for which he was trained. The Eighth

Circuit also rejected the district court's suggestion that job availability was a consideration in determining disability. The appellate tribunal said in this regard, "availability of the light work which the Secretary found the claimant could perform is not the issue. The Act is not to be interpreted as unemployment compensation insurance."

Staff: Harvey L. Zuckman (Civil Division).

Denial of Disability Benefits to Claimant Reversed; District Court Unintentionally Misled by Government Counsel as to Claimant's Last Eligibility Date. William R. Koontz v. Celebrezze (C.A. 4, No. 95553, decided November 13, 1964). D.J. No. 137-84-46. Claimant filed an application in 1957 for a "freeze" of his Social Security record. Later, he amended his application claiming a period of disability and disability insurance benefits. The Secretary denied claimant's application. Upon review, the Government contended that claimant was last eligible for benefits on December 31, 1954. The district court accepted this contention as being correct and then it determined that claimant was not disabled as of that date. Claimant appealed to the Fourth Circuit.

In the court of appeals it was pointed out that the Department of Health, Education and Welfare had advised claimant on June 12, 1959, that his last eligibility date was March 31, 1956. The United States Attorney suggested to the court that his office had unintentionally misled the district court as to the last date on which claimant was eligible for benefits. He suggested that a proper corrective would be to treat March 31, 1956, as the last eligibility date. The court of appeals accepted this suggestion and then determined that claimant was unable to pursue any gainful occupation as of that date. The court thereupon vacated the judgment of the court below and ordered the case remanded to the Secretary for the award of benefits. The court noted that, since claimant's impairments were now so clearly disabling, it would not order a general remand to the Secretary, especially in light of the fact that claimant may have been misled into waiving his right to appear at the administrative hearing on his claim.

Staff: United States Attorney Donald Page Moore, Assistant United States Attorney George D. Beter (S.D. W.Va.).

Resolution of Conflicting Medical Evidence in the Record for the Secretary; Evidence Supports Secretary's Finding of Ability to Engage in Light, Unskilled Work. Walter A. Aldridge v. Celebrezze (C.A. 5; No. 21383, decided December 3, 1964). D.J. No. 137-1-248. In the instant case, the hearing examiner determined that the claimant was entitled to disability benefits. The Appeals Council, on its own motion, decided to review the case. Additional medical evidence was inserted into the record. The hearing examiner's determination was then reversed and, upon review, the district court upheld the Secretary's decision. The court of appeals affirmed, per curiam, noting that there was a "sharp conflict" in the medical evidence in the record with respect to the matter of claimant's ability to engage in substantial gainful activity. Citing Celebrezze v. Bolas, 316 F. 2d 498 (C.A. 8) as authority, the court stated that the conflict was to be resolved by the Secretary. The court then went on to hold that the finding of the Secretary--that claimant's remaining functional capacity was not inconsistent with the ability to engage in light unskilled

work--was adequately supported by the evidence in the record.

Staff: Stanley D. Rose (Civil Division).

FEDERAL TORT CLAIMS ACT

Exculpatory and Indemnity Provisions in Government Lease Insulates United States from Liability to Lessee for Damages Incurred When Lessee's Cattle Were Allegedly Poisoned by Contaminated Water on Government Land. Aaron Bailey v. United States (Civ. No. 64-308, N.D. Ala., November 6, 1964). D.J. No. 157-1-155. Plaintiff, who had leased land on the Redstone Arsenal Military Reservation for grazing and agricultural purposes, brought suit under the Federal Tort Claims Act as a result of the death of certain cattle which had been grazing on the leased premises. It was alleged that the United States negligently allowed poisonous contaminated water to run through a drainage ditch onto the leased premises from which the cattle drank, became sick, and died. The government moved for summary judgment based on the language in the lease which provided that: "[T]he United States . . . shall not be responsible . . . for damages to the property of the lessee . . . arising from activities of the United States or its contractors, and the lessee shall hold the United States . . . harmless from any and all such claims." The plaintiff contended that the indemnity clause in the lease should not be construed to indemnify the United States for damage caused by its own negligence. The Court, after considering the indemnity agreement provision in the lease granted the government's motion for summary judgment. See also United States v. Starks, 239 F. 2d 544 (C.A. 7).

Staff: United States Attorney, Macon L. Weaver, Assistant United States Attorney E. Ray Acton (N.D. Ala.).

FALSE CLAIMS ACT

Criminal Conviction on Same Transactions and Issues Operates as Res Judicata in Civil False Claims Act Suit. United States v. Eagle Beef Cloth Company, Inc. (E.D. N.Y., Civ. No. 64-C-686, October 28, 1964). D.J. No. 120-52-9. Following the conclusion of criminal proceedings against the defendant for the submission of false statements and false statements and false claims in connection with a subsidy program of the Department of Agriculture, the United States brought a civil action under the False Claims Act (31 U.S.C. 231) for recovery of double the amount of its damage and a $2,000 statutory forfeiture for each false claim. In the prior criminal proceedings the defendant was convicted, on a plea of guilty, on several counts of the indictment. Two counts in that indictment specifically charged defendant with having submitted claims for subsidy payment in the respective sums of $588.69 and $394.13, whereas it knew that the transactions were not eligible for subsidy. The United States moved in the civil action for partial summary judgment as to those two claims on the ground that defendant's criminal conviction operated as res judicata (collateral estopped by judgment) in favor of the Government. The motion was supported by an affidavit which recited that the full amounts of the two claims had actually been paid by the United States. The court granted the motion and awarded partial summary judgment in favor of the United States for $5,965.94, representing double the amount of the payment on the two claims plus two forfeitures of $2,000 each.

Staff: United States Attorney Joseph P. Hoey, Assistant United States Attorney George L. Barnett (E.D. N.Y.).

MEDICAL EXPENSE RECOVERY ACT

Under Georgia Law the United States May Not Intervene in a Mandamus Action by a Judgment Creditor Against a Sheriff Holding Moneys Collected on a Judgment To Recover an Amount Included in the Judgment for Medical Expenses Owed to the United States. Sabino v. United States (No. 22,666, Sup. Ct. of Georgia, November 5, 1964). D.J. No. 77-0-1. A judgment creditor brought mandamus against the Sheriff of Muscogee County, Georgia, to require payment of $1,100 collected on levy of execution of Sabino's judgment rendered in a personal injury action. Included among the items of damages, was an amount due the Government for medical care and treatment furnished Sabino in an Army hospital. Unaware of the suit, the United States did not exercise its right to intervene pursuant to the provisions of the Medical Expense Recovery Act, 42 U.S.C. 2651. It had, however, previously obtained an assignment from Sabino of his cause of action to the extent of such medical expenses. Once apprised of the mandamus action, the Government sought and was granted permission to intervene, under Section 24-211 of the Georgia Code. That statute provides for the assertion, in an equity proceeding commenced against a sheriff, of claims by lien holders to moneys collected and held by the sheriff on levy of execution.

The Supreme Court of Georgia reversed, holding that under Georgia law the allowance of the intervention was erroneous. The court ruled that the Government could not convert the mandamus action into an equity proceeding under the Georgia statute for distribution of the proceeds of the judgment. The question of the Government's right to intervene under the Medical Expense Recovery Act was not squarely presented to the Georgia Supreme Court. The applicability of that Act to the situation in this case is questionable, since the provisions in the federal statute for enforcement of the Government's right to recover medical expenses refers to intervention or joinder in any action or proceeding "brought by the injured * * * person * * * against the third person who is liable for the injury." 42 U.S.C. 2651(b). This case points up the necessity for the Government, in order to enforce its rights under the Medical Expense Recovery Act, to intervene in the personal injury action, as the Act contemplates, while that action is still pending and before it has gone to judgment.

Staff: United States Attorney Floyd M. Buford and Assistant United States Attorney Sampson M. Culpepper (M.D. Ga.).

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

DENATURALIZATION

Concealment of Marital Status; Materiality; Evidence: Validity of Proxy Marriage. United States v. Domenico D'Agostino (C.A. 2, No. 28,794, Nov. 23, 1964). D.J. File No. 38-53-590. Defendant was born in Italy in 1889 and married there in 1915. Children were born of the marriage in 1916, 1918 and 1920. He was admitted to the United States as an immigrant in 1921 and was naturalized in 1927 on a naturalization petition reciting that he was not married. Many years later, this denaturalization proceeding was brought under 8 U.S.C. 1451(a) charging that he had procured naturalization by concealment of material facts and by wilful misrepresentation. The complaint alleged that he had stated falsely, among other things, that he was not married and had no children. The defendant did not testify at the trial and produced no witnesses.

The Government introduced the following evidence: A certificate by the Registrar of Vital Statistics of defendant's birthplace in Italy certified to the facts of his proxy marriage; that there is no record of its dissolution; and that three children were born of the marriage. The record of defendant's arrival in 1921 recited that he was married and listed his wife's name as his nearest relative. His declaration of intention to become a citizen, filed in 1921, contained the same information. His petition for naturalization, filed in 1926, recited that he was not married. The naturalization examiner who had examined him at that time testified, on the basis of his customary practice and contemporaneous notations, that he had questioned the defendant as to his marital status and that the defendant had stated under oath that he was not married. Another naturalization examiner testified that in 1936, when the defendant applied for a new certificate of naturalization to replace the mutilated original, the sworn application as originally submitted stated he was married; when examined by the examiner under oath, however, the defendant said he was single. On this evidence, the district court found as fact that the defendant had wilfully misrepresented his marital status and entered judgment against him.

The Court of Appeals affirmed. Noting that the defendant had advisedly raised no issue with respect to the materiality of the concealed marital status, the Court pointed to a long line of cases holding false statements of this nature to be material. Indeed, said the Court, the naturalization statute in effect in 1927, when the defendant was naturalized, specifically required the naturalization petition to state details as to the petitioner's marital status, such as the name, birthplace and residence of his wife and of each child.

Dismissing defendant's contention that the Italian marriage record should have been rejected because there was no evidence that under Italian law proxy marriages were valid in Italy, the Court held the documents were properly attested and entitled to be introduced as proof of the marriage record. As official acts, they were covered by the presumption of official regularity. The

fact that the marriage was by proxy rather than by more conventional means was immaterial. The Court also rejected defendant's challenge to the evidence concerning his 1936 application for a new certificate. Although these events took place after the defendant's naturalization in 1927, the Court held they were relevant to show his intent in 1926 and 1927 to conceal the existence of his marriage. Further, his 1936 statement that he was married constituted an admission and thus was some evidence of his marriage.

Staff: United States Attorney John T. Curtin (W.D. N.Y.).

GAMBLING

Interstate Travel Act - 18 U.S.C. 1952; Use as Evidence of Tax Registration Form Required by Law to Be Filed with Government Is Not Violative of Privilege against Self-incrimination; Furnishing Employment in and of Itself Induced Interstate Movement; Constitutionality of 18 U.S.C. 1952; Inspection of Documents under 18 U.S.C. 3500; Prosecutor's Remarks not a Basis for Reversal. United States v. Zizzo, et al. (C.A. 7, Oct. 19, 1964). D.J. File No. 165-26-1. The co-defendants of Zizzo were employees in the operation of his gambling business in Indiana. In the federal wagering returns signed by Zizzo, he gave Illinois addresses for his three employees who are co-defendants. The Court sustained the theory of the Government of a violation of 18 U.S.C. 2 and 1952 (travel in interstate commerce with intent to promote, manage, establish, or carry on the unlawful activity of a business enterprise involving gambling).

As to the conviction of Zizzo the proof established that his gambling operations in Indiana were the inducement for the interstate travel of his employees who lived in Illinois; that Zizzo thus aided and abetted his three co-defendants in that travel and in their engaging in illicit gambling operations in Indiana; that when they crossed the Illinois-Indiana state line, they had the requisite intent to engage in the illegal activity, and that they did, in fact, as employees of Zizzo, receive moneys placed on bets, and did telephone bets to Zizzo's headquarters.

As to the conviction of Zizzo's three co-defendants, the proof established that they were residents of Illinois and travelled in interstate commerce with the requisite intent of assisting Zizzo in carrying on the promotion of the unlawful activity of a gambling operation in the state of Indiana.

The Court rejected the defendants' contention that since Zizzo was required by law to file returns, their use as evidence in the instant case violated the privilege against self-incrimination, citing United States v. Kahriger, 345 U.S. 22, and Lewis v. United States, 348 U.S. 419, for the proposition that the privilege against self-incrimination does not render incompetent as evidence, information which the law has compelled an individual to furnish in the past of a future intention.

To Zizzo's contention that he personally did not travel in interstate commerce in running his business, that he did not have anything to do with the interstate travel of the other defendants, and that he did not aid or abet their

interstate travel or even know of it, the Court cited Bass v. United States, 324 F. 2d 168 (C.A. 8, Nov. 1, 1963), where in an analogous situation it was held "... that Bass actually furnished the four with employment and thus induced their interstate movement."

The Court also upheld the constitutionality of 18 U.S.C. 1952 and the propriety of the trial court's refusal to turn over certain investigative reports to the defendant under 18 U.S.C. 3500. It further held that under the facts of this case, certain objectionable remarks by the prosecutor did not constitute a basis for reversal.

Staff: United States Attorney Alfred W. Moelling (N.D. Ind.); Sidney M. Glazer, Criminal Division, Department of Justice.

GAMBLING

Wagering Taxes; Compulsory Appearance as Witnesses before Grand Jury Which Subsequently Indicted Defendants Not Violation of Fifth Amendment; Registration and Occupation Tax Provisions of Tax on Wagers Not Violative of Privilege against Self-incrimination. United States v. Cefalu, et al. (C.A. 7, Oct. 27, 1964). D.J. File No. 160-85-25. Defendants were convicted of accepting taxable wagers during the period January 1, 1962 to March 22, 1962 within the meaning of 26 U.S.C. 4401, and with failing to pay a special occupational tax thereon (wagering tax stamps) as provided by 26 U.S.C. 4411, in violation of 26 U.S.C. 7262.

The defendants charged prejudicial error arising from a denial of their pretrial motion to dismiss the indictment because of their appearance as witnesses before the grand jury which subsequently indicted them, contending that the ultimate constitutional question is whether at the time of their compelled attendance they were probable defendants or merely potential defendants, citing United States v. Keenan, 267 F. 2d 118 (C.A. 7, 1959). In rejecting the defendants' argument, the Court said resolution of the attempted distinction was unimportant in the instant case; that the defendants were represented by counsel; that when they appeared before the grand jury they were advised of their constitutional right to refuse to answer any question that might tend to incriminate them; that they claimed such right and refused to testify before the grand jury; and that the privilege accorded one called before a grand jury is the election to refuse to give testimony which might tend to show he had committed a crime, and is not designed to effect a prohibition against inquiry by an investigative body.

The defendants also raised the issue whether, in view of the enactment of 18 U.S.C. 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises) and 18 U.S.C. 1953 (interstate transportation of wagering paraphernalia), the registration and occupational tax provisions of the tax on wagers compel the disclosure of incriminating information in violation of the Fifth Amendment. They attempted to distinguish United States v. Zizzo, ____ F.2d ____ (C.A. 7, Oct. 19, 1964) and Lewis v. United States, 348 U.S. 419 (1955), which held that the privilege against self-incrimination does not render incompetent as evidence, information which the law has compelled an individual to furnish in the past of a future intention. Citing Communist Party

of the United States v. United States, 331 F. 2d 807 (C.A. D.C., 1964), defendants claimed that the very act of registration is performing an act to promote gambling. The Court rejected this argument, stating that the act of registering in the instant case was merely a statement of future intent, unlike Communist Party, where the act of registering was held to be necessarily incriminating whether or not any information other than the registrant's name was supplied.

Staff: United States Attorney James Brennan; Assistant United States Attorney William Mulligan (E.D. Wisc.).

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

Petition by Secretary of Labor to Compel Testimony by Witnesses Enforced (29 U.S.C. 521). Wirtz v. Robb, et al. (E.D. Mich. Nov. 2, 1964). D.J. File No. 156-37-168. Respondents, officers and active managing officials of a corporation, responded to a subpoena issued by the Secretary under Section 601 of LMRDA on the basis of "reasonable grounds for believing that respondents and other persons have violated or are about to violate Section 203" reporting provisions.

After answering a few preliminary questions, the witnesses declined to answer further questions on the grounds that (1) their answers might incriminate them; (2) they were entitled to know the factual foundation for such investigations; and (3) they testified before a grand jury and the Justice Department attorney who conducted the grand jury proceedings was also present at their examination before the hearing officers in this matter.

The Court held (1) that the self-incrimination claim was invalid because of Malloy v. Hogan, 378 U.S. 1, and Murphy v. Waterfront Commission, 378 U.S. 52, which would prevent state or federal prosecutions on the basis of the answers given; (2) that there is no right to know the factual foundation for an investigation under Section 601 of LMRDA was decided by the Sixth Circuit Court of Appeals in Goldberg v. Truck Drivers Local Union, 293 F. 2d 807, which holding was accepted and adopted by the Court of Appeals of the District of Columbia in International Brotherhood of Teamsters v. Goldberg, 303 F. 2d 402; and (3) that grand jury proceedings and Labor Department hearings are completely independent of each other, and appearance before the former is no basis for refusing to answer questions before the latter any more than was the fact of the presence of the Justice Department attorney at both proceedings.

Staff: United States Attorney Lawrence Gubow; Assistant United States Attorney Paul J. Komives (E.D. Mich.).

COURT REPORTER ACT

Right of Indigent to Free Transcript on Collateral Attack; Hardy v. United States, 375 U.S. 277 (1964), Held Not to Require Production of Trial Transcript at Government Expense to Indigent Prisoner for Collateral Attack

on Conviction, Absent Showing of Any Need for Transcript. United States v. Shoaf (4th Cir., decided September 29, 1964). In Glass v. United States, 317 F. 2d 200 (1963), the Court of Appeals for the Fourth Circuit held that an indigent prisoner has no right to a free copy of his trial transcript for collateral attack on his conviction, in the absence of a showing that such transcript is necessary to enable him to press specified points. Some months later, in Hardy v. United States, 375 U.S. 277 (1964), the Supreme Court held that when an indigent defendant is represented by new counsel on appeal from his conviction he is entitled to a transcript of the entire trial proceedings at Government expense, without first showing a specific need for the transcript. The rationale of the decision is that counsel not present at trial will not be able to properly represent his client on the appeal unless he can review for himself the entire proceedings below to determine whether error occurred. In the instant case the Court of Appeals, asked to re-examine its decision in Glass in light of the Hardy case, reaffirmed its prior opinion.

Shoaf was convicted after two jury trials and failed to appeal. Subsequently, he filed a petition seeking a copy of the trial transcripts, but alleged no specific error that he claimed he would be able to prove from an examination of the transcripts. In affirming the District Court's denial of this petition, the Court of Appeals distinguished Hardy and similar cases following Griffin v. Illinois, 351 U.S. 12 (1956), as relating to rights of a defendant on direct appeal, when a particular need is shown. Unlike Hardy, the appellant in the instant case sought copies of his trial transcripts for himself (rather than new counsel) and for collateral attack (rather than direct appeal). There is no general need for a transcript for collateral attack on a conviction, since such attacks are usually predicated on events occurring outside the courtroom or in the courtroom in the presence of the defendant. While at least a partial transcript might be needed to prove a particular claim of error, "rarely, if ever, would the defendant, himself, need a transcript of the trial to become aware of the events or occurrences which constitute a ground for collateral attack." (Slip. op. at 7.)

The Court of Appeals also implied that in an appropriate case, where a particular need for a transcript is shown, the Fifth Amendment requires the Government to provide a free transcript to a prisoner challenging his conviction under 28 U.S.C. 2255. Section 753(f) of Title 28, United States Code, the Court Reporter Act, provides for payment by the United States "for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend or appeal in forma pauperis." United States v. Stevens, 224 F. 2d 866 (3d Cir. 1955), and United States v. Carter, 88 F. Supp. 88 (D. D.C. 1950), held that this section authorizes payment only for transcripts to be used in the same proceeding. Since a motion under Section 2255 is a new proceeding, these cases held that Section 753(f) does not authorize payment for a trial transcript for use in a 2255 proceeding. On August 3, 1964, the Comptroller General of the United States issued a ruling that adopted this interpretation of Section 753(f). Corrective legislation pending in the 88th Congress died in committee. In United States v. Glass, supra, 317 F. 2d at 203 n. 6, the instant court questioned the continuing validity of Stevens in light of the Griffin case, supra, and Lane v. Brown, 372 U.S. 477 (1963), and Smith v. Bennett, 365 U.S. 708 (1961), which hold that the Fourteenth Amendment prevents a state from foreclosing a prisoner from any area of direct or collateral

attack solely because of his indigency. It would be anomalous indeed, the court pointed out in the instant case, if the Fifth Amendment required any less of the Federal Government.

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

IMPORTANT NOTICE
Mortgage Foreclosure Under 28 USC 2410

1. Releases of Rights of Redemption

By Department of Justice Memorandum No. 390 dated November 24, 1964, all United States Attorneys were advised of the redelegation of the authority to release in certain cases the right of redemption of the United States in respect of federal tax liens arising under Section 2410(c) of Title 28, United States Code, or under State law when the United States has been joined as a party to a suit.

The attention of all United States Attorneys is directed to the following factors with respect to the redelegation:

a. The redelegation relates only to real property on which is located only one single-family residence and all other real property having a fair market value not exceeding $10,000.

b. The United States Attorney may authorize the release only if the appropriate Regional Counsel favorably recommends release for the consideration offered which in no event can be less than fifty dollars ($50). No consideration is required for application by a Federal agency.

c. In connection with determining the value of the right of redemption to the United States, no consideration can be given to whether funds are available to exercise the right of redemption or whether the right of redemption will in fact be exercised by the United States.

d. A copy of the application for release should be sent to the Tax Division in every case where the United States Attorney issues the release of the right of redemption.

2. Copies of Complaints

Where the United States is properly named a party-defendant in a quiet title or foreclosure action pursuant to 28 USC 2410 because of the existence of a federal tax lien, it will no longer be necessary to advise the Regional Counsel of the Internal Revenue Service of the pendency of this action or to send him a copy of the complaint at the time you are served. This procedure applies only to actions coming properly within the purview of 28 USC 2410 and you will continue to be advised by the Tax Division when service has been made on the Attorney General and the jurisdictional requirements of the statute have been met.

While it will no longer be necessary to deliver to the Regional Counsel copies of the complaints in actions properly instituted under 28 USC 2410, you should immediately advise the Regional Counsel as well as the Tax Division of the receipt of offers in compromise other than application for release of rights of redemption covered under Memorandum No. 390 and also promptly advise of adverse decisions. If problems arise in these cases, you should not hesitate to bring the matter to the attention of the Regional Counsel as well as the Tax Division.

CIVIL TAX MATTERS
Supreme Court Decisions

Internal Revenue Summonses; Government does not have to show probable cause to suspect fraud in order to examine records in investigations of tax liability for years barred to assessment by the statute of limitations in the absence of fraud. United States v. Max Powell, decided November 23, 1964, No. 54, this Term (14 A.F.T.R. 2d 5942); Bayard Edward Ryan v. United States, decided November 23, 1964, No. 12, this Term (14 A.F.T.R. 2d 5947). The Supreme Court has now resolved the conflict among the Circuits as to what showing, if any, the Government must make to obtain enforcement of an Internal Revenue summons issued in an investigation into "closed years." In a 6 to 3 decision (Powell) the Court upheld the Government's contention that it does not have to show probable cause to suspect fraud. The Court held that the original predecessor of Section 7605(b) of the 1954 Code was enacted to protect taxpayers from harassment merely by requiring agents to get permission from their superiors before seeking to reexamine records, not by requiring any showing of probable cause. The Commissioner must show that the investigation is for a legitimate purpose, that the inquiry is relevant to that purpose, that the information sought is not already within his possession and that the administrative steps required by the Code have been followed. The court may look into the underlying reasons behind the investigation only if the taxpayer has made a showing of abuse of process; the taxpayer does not carry this burden of proving abuse of process by the mere showing that the statute of limitations on assessing ordinary deficiencies has run or that the records have previously been examined.

In Ryan the Government had made a showing of reasonable cause to suspect fraud, and for that reason alone two of the three dissenters from the Powell opinion (Justice Stewart and Goldberg) concurred in the result reached in Ryan. Justice Douglas dissented from both opinions.

Staff: Norman Sepenuk and Joseph M. Howard, Tax Division.
Bruce J. Terris, Assistant to the Solicitor General.

District Court Decision

Internal Revenue Summons; Examination of Books and Records; Gambling Casino Records Used for Internal Control Held Relevant and Material to Tax Investigation and Subject to Examination. In the Matter of the Examination of D. I. Operating Company. (D. Nevada, October 8, 1964). (CCH 64-2 U.S.T.C. ¶9814). During the course of an investigation of the tax liability of the Desert Inn Operating Company in Las Vegas, Nevada, an Internal Revenue Agent issued a summons which required the production of various corporate records utilized in the internal control of casino operations, and which dealt primarily with credit play. Although normally destroyed, the records in question had been discovered at the casino by Internal Revenue Agents.

The District Court had previously ordered compliance with the summons over the objection that the records were used only in connection with internal control, that they were not permanent accounting records, and that they were usually destroyed, but that order was appealed to the Ninth Circuit Court of Appeals and that court remanded the case and directed the District Court to hold a hearing to determine the relevancy and materiality of the requested records. (321 F. 2d 586). After a hearing, the District Court, in finding that the records sought were relevant and material, held that under Section 7602 of the Internal Revenue Code, authorizing examination of any books, papers, records or other data relevant or material to an inquiry into the correctness of a return and the determination of liability, no worthwhile or practical distinction can be made between permanent accounting journals, ledgers, invoices, receipts and the like, and so-called temporary records or entries concerning transactions affecting taxable income.

Therefore, all temporary, disposable game credit cards, pit credit cards, cashier's daily records of debits and credits to customers' I.O.U. accounts and similar records were held to be properly subject to examination.

Staff: United States Attorney John W. Bonner (D. Nev.); and Fred B. Ugast (Tax Div.).

State Court Decisions

Priority of Liens; Simultaneous Attachment of Federal Tax Liens and Liens of Judgment Creditors to Fund of Money Entitles United States to Priority. Bernard Berkowitz, et al. v. Maxwell House Hotel Corp., et al. (N. Y. Supreme Court, March 31, 1964). (CCH 64-2 U.S.T.C. ¶9824). Judgment creditors of the taxpayer served subpoenas and restraining orders in supplementary proceedings under the New York Civil Practice Act against a third party on April 12 and May 10, 1963, and the United States filed a federal tax lien on June 11, 1963, claiming a lien upon all property and rights to property of the taxpayer. All money received by the third party and held for the account of the taxpayer was received on various dates between June 19, 1963, and March, 1964. The judgment creditors claimed priority on the ground that their respective liens were filed prior to the filing of the federal tax liens. The Government, however, contended that prior to June 19, 1963, there was no property belonging to the taxpayer to

which the federal tax liens and the judgment liens could attach. On that date, both the federal tax liens and the liens of the judgment creditors would simultaneously attach to any funds owed the taxpayer, thereby entitling the Government to priority. The Referee adopted the Government's position and held that a federal tax lien is superior to any simultaneously attaching interest, citing United States v. Graham, 96 F. Supp. 318 (S.D. Cal.), affirmed, sub nom. California v. United States, 195 F. 2d 530 (C.A. 9th), certiorari denied 344 U.S. 831.

Staff: United States Attorney Robert M. Morgenthau; and Assistant United States Attorney John R. Horan (S.D. N.Y.).

Priorities of Creditors; Attorneys' Fees; Federal Tax Lien Held Entitled to Priority Over Claim for Fees of Attorney of Mortgagee Even though Mortgage Was Superior to Tax Lien. The Camptown Savings and Loan Association v. United States, et al. (New Jersey Superior Court, September 9, 1964). (CCH 64-2 U.S.T.C. ¶9823). The mortgagee foreclosed its mortgage against certain property encumbered by a junior federal tax lien claiming a counsel fee pursuant to Section 4:55-7(c) of the Revised Rules of New Jersey.

The mortgagee attempted to distinguish United States v. Pioneer American Ins. Co., 374 U.S. 84, holding that attorneys' fees of a foreclosing senior mortgagee were inferior to federal tax liens encumbering the property, on the basis that in New Jersey the amount of the fee is fixed by a rule which has the force of a statute and thus the amount of such fees is fixed and definite and not merely a "reasonable" fee as provided for in the mortgage in Pioneer. The mortgagee further contended that, because the fee was fixed by rule, it was an "administration expense."

The Court, in ruling that the federal tax lien was superior to the claim for counsel fees, rejected the mortgagee's arguments because the counsel fee could not become certain until after the mortgage fell into default, was foreclosed and the amount due the mortgagee was adjudged by the Court, all of which was after the federal tax lien had been filed. There was no question of an administration expense, the Court reasoned, because the attorney did not create, benefit or protect any fund and he "administered nothing."

Staff: United States Attorney David M. Satz, Jr.; and Assistant United States Attorney Nathan Edgar Finkel (D. N.J.).

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