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DEPARTMENT OF JUSTICE

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BULLETIN

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EMPLOYEE ORIENTATION

There is a growing need for better and more uniform orientation of all new employees. Shortly after their entry on duty they should receive full information regarding conditions of employment, employee rights and benefits, and background information about your particular offices and operations and generally about the Department of Justice as a whole.

Acquainting the new employee with his job and work environment and where he or she fits into the picture will help to adjust to new work, and will add interest and meaning to the job. Proper orientation should show productive results quickly. The relatively little effort required in this regard will pay dividends.

Because of the importance of this initial training, an orientation kit has been prepared containing pamphlets, brochures and instructions for new employees. A sample kit, will be forwarded to you shortly. An additional supply is available upon requisition. In ordering this material, each item should be listed on your inventory.

Below is a list of minimal material for distribution upon entry on duty. (These materials are exclusive of the personnel forms required by Title 8, page 8, U.S. Attorneys Manual.) Any information of a local nature which you consider essential might also be inserted in the kit.

1. Booklet "You and Your Job", gives information about the history and work of this Department.
2. Brochures explaining various health insurance plans under the Federal Employees Health Benefits Program.
3. Federal Employees Group Life Insurance pamphlets.
4. Standard Form 105, Certificate of Membership in the U.S. Civil Service Retirement System, for all permanent employees.
5. Federal Employee Facts pamphlets, Numbers 1, 2 and 4.
6. Bureau of Employees' Compensation Pamphlet CA-11, "When Injured at Work."
7. Order No. 300-63 relating to Standards of Conduct.
8. Form DJ-90, listing organizations designated by the Attorney General pursuant to Executive Order 10450.
9. Orders No. 265-62, 258-62 and 306-63 regarding Equal Employment Opportunity.
10. Order No. 293-63 concerning Employee-Management Cooperation.
11. Memorandum No. 372 and attachments, outlining the Department's Merit Promotion Plan.
12. Order No. 304-63 which sets forth the Department's Grievance Procedure.
13. Order No. 307-63 relating to Reconsideration and Review of Adverse Actions.

As part of the orientation, a brief explanation of each of the above might be helpful.

MONTHLY TOTALS

As of February 28, 1965, the caseload was some 1,700 cases higher than on the same date in fiscal 1964, and some 7,100 cases higher than on June 30, 1961. Filings are eight per cent ahead of terminations, and although civil cases comprise two-thirds of the pending caseload, they continue to represent the smaller number of terminations. Following is a table giving a comparison of the cases filed, terminated and pending during the first eight months of fiscal year 1964 and 1965.

	First 8 Months Fiscal Year 1964	First 8 Months Fiscal Year 1965	Increase or Decrease Number	%
Filed				
Criminal	22,076	21,603	- 473	- 2.14
Civil	18,085	18,575	+ 490	+ 2.71
Total	40,161	40,178	+ 17	+ .04
Terminated				
Criminal	20,737	19,604	- 1,133	- 5.46
Civil	17,094	17,559	+ 465	+ 2.72
Total	37,831	37,163	- 668	- 1.77
Pending				
Criminal	11,108	12,021	+ 913	+ 8.22
Civil	23,379	24,186	+ 807	+ 3.45
Total	34,487	36,207	+ 1,720	+ 4.99

Total terminations during February were lower than for any of the preceding five months - in fact, the second lowest total for the year. Filings exceeded terminations by 705 cases. During the first eight months of fiscal 1965, terminations have been higher than terminations in only one month. Following is an analysis of the number of cases filed and terminated monthly during the first eight months of fiscal 1965.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,321	2,460	4,781	2,230	2,391	4,621
Aug.	2,176	2,224	4,400	1,846	1,590	3,436
Sept.	3,284	2,214	5,498	2,054	2,556	4,610
Oct.	3,284	2,464	5,748	3,251	2,131	5,382
Nov.	2,497	2,005	4,502	2,741	2,132	4,873
Dec.	2,574	2,204	4,778	2,612	2,059	4,671
Jan.	2,698	2,593	5,291	2,529	2,566	5,095
Feb.	2,769	2,411	5,180	2,341	2,134	4,475

For the month of February, 1965, United States Attorneys reported

collections of $3,002,525. This brings the total for the first eight months of this fiscal year to $45,593,653. Compared with the first eight months of the previous fiscal year this is an increase of $6,091,106 or 15.42 per cent over the $39,502,547 collected during that period.

During February, 1965, $4,790,641 was saved in 82 suits in which the government as defendant was sued for $5,407,131. 48 of them involving $3,316,203 were closed by compromises amounting to $443,044 and 19 of them involving $1,214,240 were closed by judgments amounting to $173,446. The remaining 15 suits involving $876,688 were won by the government. The total saved for the first eight months of the current fiscal year was $73,747,514 and is an increase of $18,111,717 or 32.55 per cent over the $55,635,797 saved in the first eight months of fiscal year 1964.

The cost of operating United States Attorneys' Offices for the first eight months of fiscal year 1965 amounted to $12,356,198 as compared to $11,467,126 for the first eight months of fiscal year 1964.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of February 28, 1965.

CASES

Criminal

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

CASES

Civil

Ala., N.	Colo.	Hawaii	Ky., E.	Miss., N.
Ala., M.	Conn.	Idaho	Ky., W.	Miss., S.
Ala., S.	Del.	Ill., N.	La., W.	Mo., E.
Alaska	Dist. of Col.	Ill., S.	Me.	Mo., W.
Ariz.	Fla., N.	Ind., N.	Mass.	Mont.
Ark., E.	Ga., N.	Ind., S.	Mich., E.	N.H.
Ark., W.	Ga., M.	Iowa, S.	Mich., W.	N.J.
Calif., S.	Ga., S.	Kan.	Minn.	N.M.

CASES (cont.)

Civil

N.Y., E.	Okla., N.	R.I.	Tex., E.	Wash., W.
N.Y., W.	Okla., E.	S.C., E.	Tex., S.	W. Va., N.
N.C., E.	Okla., W.	S.C., W.	Tex., W.	W. Va., S.
N.C., M.	Ore.	S.D.	Utah	Wyo.
N.C., W.	Pa., E.	Tenn., E.	Vt.	C.Z.
N.D.	Pa., M.	Tenn., M.	Va., E.	Guam
Ohio, N.	Pa., W.	Tenn., W.	Va., W.	V.I.
Ohio, S.	P.R.	Tex., N.	Wash., E.	

MATTERS

Criminal

Ala., N.	Ga., M.	Md.	Ohio, S.	Tex., S.
Ala., M.	Ga., S.	Miss., N.	Okla., N.	Tex., W.
Ala., S.	Idaho	Miss., S.	Okla., E.	Utah
Alaska	Ill., E.	Mo., W.	Okla., W.	Va., E.
Ariz.	Ill., S.	Mont.	Pa., E.	Va., W.
Ark., W.	Ind., N.	Neb.	Pa., M.	Wash., E.
Calif., S.	Ind., S.	Nev.	Pa., W.	W. Va., N.
Colo.	Iowa, N.	N.H.	R.I.	W. Va., S.
Conn.	Iowa, S.	N.J.	S.C., E.	Wyo.
Del.	Ky., E.	N. Mex.	S.C., W.	Guam
D. C.	Ky., W.	N.C., M.	S.D.	
Fla., N.	La., W.	N.C., W.	Tenn., W.	
Ga., N.	Me.	N.D.	Tex., N.	

MATTERS

Civil

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

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Government Charges Violation of Section 1 of Sherman Act and Section 7 of Clayton Act. United States v. Penick & Ford, Ltd., Incorporated, et al., (D. N.J.) D.J. File 60-0-37-847. This is a civil action under Section 7 of the Clayton Act and Section 1 of the Sherman Act to prevent the proposed acquisition by R. J. Reynolds Tobacco Company of all the business and properties of Penick & Ford, Ltd., Incorporated. The complaint also seeks that consummation of the acquisition be enjoined during the pendency of the lawsuit.

R. J. Reynolds is the largest tobacco company in the United States with 1963 sales of $1,672,444,707, yielding operating profits of $283,812,123. Reynolds is also an extremely large purchaser of paper and packaging materials.

Penick & Ford is the fourth largest corn starch producing company in the United States and is also a sizeable producer of processed foods. In 1963, Penick & Ford sales were $58,787,492 with a net income of $4,047,432.

The single largest use of corn starch is in making paper and packaging products. The complaint alleges that reciprocity is a current business condition in the corn starch industry. In particular, starch sellers make or withhold making purchases of paper and packaging materials from companies in order to induce such companies to purchase starch in return. By virtue of the acquisition Reynolds and Penick combined would have very large purchasing power with respect to paper and packaging products: more than $52 million annually on a combined basis which would aggravate the reciprocity conditions already present in the corn starch industry.

The complaint alleges the effect of the acquisition would be to give Reynolds a substantial competitive advantage over other firms engaged in selling starch who have less resources and who lack the large-scale buying power possessed by Reynolds. The complaint also alleges that the acquisition may foster other acquisitions to the detriment of competition, and discourage entry into the starch business.

The terms of the acquisition transaction are these: Reynolds is to buy for cash all Penick's assets and business at a rate of $22 per share of Penick, or a total of $96 million. This is a $5 per share premium over recent market prices of Penick stock. Penick's stockholders approved the deal at a meeting at 10:00 A.M., April 6, at which our intention to sue was announced. In view of our intention to seek a TRO, Reynolds and Penick deferred closing, scheduled for 2:00 P.M. on April 6. At a conference with Judge James Coolahan in Newark on April 6 at 1:30 P.M., defendants agreed to defer closing until the Court's disposition of our motion for a preliminary injunction, set for hearing beginning on May 11, 1965. A stipulation to that effect is to be presented to Judge Coolahan.

Staff: George Miron, Milton Kallis and Sinclair Gearing (Antitrust Division)

Court Rules Liquor Companies Have Violated Section 1 of Sherman Act. United States v. The House of Seagram, Inc., et al., (S.D. Fla.) D.J. File 60-257-42. On Thursday, March 25, 1965, the Honorable William A. McRae, Jr. filed findings of fact and conclusions of law in favor of the Government in this case. The Court concluded, among other things, that at various times from January 1959 to date The House of Seagram, Inc. (a wholly-owned national sales company of Joseph E. Seagram & Sons, Inc. and its exclusive wholesale distributors of Seagram brands (Seagram 7 Crown, Seagram V.O. and Seagram Gin) in Southern Florida have been parties to an unlawful combination and conspiracy to enforce and maintain resale prices on Seagram brands against individual retail liquor dealers by various acts of threats, intimidation and coercion in violation of Section 1 of the Sherman Act.

The Court held that the laws of the State of Florida do not permit the enforcement of resale prices against retailers who are not parties to resale price agreements, that efforts by defendant Seagram and its wholesalers to coerce one or more retailers in Southern Florida to adhere to suggested retail prices on Seagram brands are not lawful under Florida law, and therefore do not fall within the Miller Tydings and McGuire Act exceptions to the Sherman Act. The Court also ruled that agreements by retailers with Seagram to discontinue advertising Seagram brands are tantamount to agreements not to compete and constitute per se violations by Seagram of Section 1 of the Sherman Act.

The Court went on to say that the activities of Seagram in this case were more flagrant than the activities condemned in United States v. Parke Davis, and that the limited privilege which exists under United States v. Colgate & Co. is manifestly not available in the present case.

Separate hearings on the nature and scope of injunctive relief will be conducted by the Court at some time during the latter part of June or the early part of July of this year.

Staff: Wilford L. Whitley, Jr., Marshall C. Gardner and Ernest T. Hays (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

CIVIL SERVICE

Discharge of Civil Service Employee Upheld. De Fino v. Fitzpatrick (C.A. 1, No. 6407, March 8, 1965). D.J. File 145-14-466. Plaintiff, a civilian employee of the Air Force and a veterans preference eligible, was discharged in 1957 on grounds of insubordination. Having failed in his appeal to the Civil Service Commission, he sought review in the United States District Court for the District of Columbia. This action was dismissed, and the dismissal was affirmed on appeal. Plaintiff then sued for back pay in the Court of Claims. This suit was also dismissed. Plaintiff then brought this action against his former personnel officer and the local director of the Civil Service Commission, alleging that he was discharged on the basis of trumped up charges, and that he should have been laid off pursuant to a reduction in force. Plaintiff sought a declaratory judgment and an injunction requiring issuance of a reduction of force notice. The Court of Appeals affirmed the district court's dismissal of the complaint, on the ground that plaintiff's discharge "antedated the time when he would have been laid off by approximately three months, and the propriety of his discharge has been thoroughly established in prior litigation."

Staff: W. Arthur Garrity, United States Attorney, Stanislaw R. J. Suchecki, Assistant United States Attorney (D. Mass.)

DIPLOMATIC IMMUNITY

Accredited Ambassador Not "Agent" of Sending State for Purposes of Service of Process. Hellenic Lines, Ltd., v. Morre, U. S. Marshal (C.A.D.C., No. 18265, March 25, 1965). D.J. File 118982-91. This mandamus action arose out of an attempt by a Greek corporation to bring an in personam libel against the Republic of Tunisia. The libellant sought to effect personal service on the foreign state by requesting the marshal to serve the Tunisian Ambassador as "Tunisia's principal agent residing in this District." The Department of Justice advised the Marshal that service on the Ambassador would violate international law and would subject the Marshal to possible criminal liability under 22 U.S.C. 252 and 253. When the marshal returned the summons unexecuted, the libellant brought mandamus.

The Court of Appeals unanimously affirmed the dismissal below. The Court reviewed pertinent customary and conventional international law, and placed heavy reliance on the views of the Department of State which had been submitted to it in response to an inquiry sent by the Court to the State Department. The Legal Adviser of that Department had informed the Court that service would prejudice the foreign relations of the United States and would be likely to impair

the performance of the Ambassador's diplomatic functions. The Court concluded that "the purposes of diplomatic immunity forbid service in this case."

Staff: Bruno A. Ristau (Civil Division)

FEDERAL TORT CLAIMS ACT

Settlement Entered Into by Injured Party with Allegedly Negligent Federal Employee and His Insurer Held to Relieve Employer, the United States, from Liability. Grover Land v. United States (C.A. 10, No. 7879, March 17, 1965). D.J. File 157-59N-54. This was a tort claims action against the United States to recover damages for injuries sustained as a result of the alleged negligence of a Government employee. Prior to instituting this action, plaintiff settled his claim against the Government employee and his insurer in the amount of $5,275. In return, plaintiff entered into an agreement designated as a "covenant not to execute." The district court dismissed the suit against the United States and the Court of Appeals affirmed per curiam "for the reasons stated by the trial court in its memorandum decision, 231 F. Supp. 883." The Court of Appeals held "that under the law of Oklahoma the agreement in settlement with the employee relieved the United States from liability." This holding is in accord with the Eighth Circuit's decision in Bacon v. United States, 321 F. 2d 880, holding that under Missouri law a "covenant not to sue" executed by the plaintiff in favor of the federal employee released the United States from liability.

Staff: Lawrence R. Schneider (Civil Division)

GOVERNMENT CONTRACTS

Government Construction Contract Contains No Implied Warranty that Government Will Not Cause Delay in Completion of Job. Kent v. United States (C.A. 2, No. 29050, March 30, 1965). D.J. File 78-51-678. Plaintiff undertook to perform work on the lighting system at Kennedy International Airport. The contract required the work to start within five days after notice and to be completed within 75 days. The work was completed 129 days late, due to Government-caused delays consisting of failure to make the work sites available. The contractor sued to recover damages for this delay. The Court of Appeals affirmed the district court's grant of summary judgment for the United States. The Court of Appeals concluded that "the whole tenor of the contract negated any implication of a warranty by the Government to make the [work] areas available at any particular time." The Court noted that the contract contained provisions regarding delay similar to those involved in United States v. Rice, 317 U. S. 61, and United States v. Howard P. Foley Co., 329 U. S. 64. These provisions provided that delays attributable to the Government would result in a corresponding extension of time within which the contractor could perform without incurring a penalty. In addition, in the present case the contract expressly negated any liability on the Government's part for delay in delivery of Government-furnished materials.

Plaintiff alleged that the Government's delay in making work sites available was negligent, and it was argued that recovery should be allowed on this basis, even in the absence of an implied warranty. The Court of Appeals found it unnecessary to decide whether it agreed with the Court of Claims' cases holding that negligence is a basis for recovery in this situation. The Court of Appeals held that the district court's grant of summary judgment was correct on the ground that plaintiff did not file or offer any evidence that the Government was in any way at fault for the delays.

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

RES JUDICATA

Dismissal of a Suit for Excess Freight Charges Against an Individual as Proprietor of the Carrier Which Is in Fact a Corporation Is Not Res Judicata in a Subsequent Suit Against the Individual for the Same Overcharges on the Ground That He Assumed the Obligations of the Corporation. United States v. J. J. Wooten (No. 21,570, C. A. 5, March 22, 1965). D.J. File 77-19-400. An action was commenced by the United States against J. J. Wooten d/b/a Atlanta-Alabama Motor Lines, Inc., to recover payments of excess freight charges. Defendant denied the proprietorship, and alleged that the carrier was a corporation, that he had at one time been a stockholder therein, and that all stock had been sold several years ealier with the approval of the Interstate Commerce Commission. He moved to dismiss on the ground that the complaint failed to allege how, he, a stockholder, was liable for the debts of the corporation, and the motion was granted. The Government moved to set aside the judgment and amend the complaint to allege that in the contract for the sale of his stock, defendant had assumed the obligations, including overcharges, of the corporation. The motion was denied. Subsequently, the Government brought an action against J. J. Wooten for the same overpayment, alleging the contract of sale of his stock in the corporation and the assumption of the corporate indebtedness. The complaint was dismissed on the ground that the dismissal of the prior complaint was res judicata.

On appeal, the Court of Appeals reversed. Noting the three fundamental facts that (1) there had been no determination on the merits of the claim for overcharges; (2) there had been no determination that Wooten was not liable to the United States as a third party beneficiary of his stock-sale contract; and (3) the dismissal in the prior suit rested on the ground that Wooten was not individually liable as a stockholder for the corporation's debts, the Court held that the foundation essential to a valid defense of res judicata was lacking. In sum, the Court held that there were two separate causes of action; that, in any event, there had been no determination on the merits; and that there was no collateral estoppel. It should also be noted that the Court would not charge the Government with knowledge of the documents in the files of the Interstate Commerce Commission (Wooten's contract of sale of his stock was on file with the Commission).

Staff: Kathryn Baldwin (Civil Division)

SOCIAL SECURITY ACT

Fourth Circuit Upholds Secretary's Denial of Disability Benefits on Ground that Claimant Had Not Shown Inability to Perform His Prior Usual or Regular Work. Dewey Frankum v. Celebrezze, (C.A. 4, No. 9768, March 24, 1965). D.J. File 137-84-277. In this social security disability benefits case, the Secretary found that the claimant had not established that he was "incapable of performing his prior, usual, or regular work." Accordingly, claimant's application for disability benefits was denied. The district court upheld this denial, and the Court of Appeals for the Fourth Circuit affirmed the lower court's decision in a per curiam opinion. The Court of Appeals stated that, upon considering the entire record and the arguments of counsel, it could not say that the district court had been clearly erroneous in concluding that there was substantial evidence to support the Secretary's determination.

Staff: Lawrence R. Schneider (Civil Division)

On Review of a Social Security Disability Benefits Case under 42 U.S.C. 405(g), the District Court May Award Attorneys' Fees and Direct the Secretary To Certify Jointly the Claimant and His Counsel for Payment of Benefits. Celebrezze v. Sparks (No. 21,536, C.A. 5, March 16, 1965). D.J. File 137-75-65. In an action by a claimant for review under Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), of the Secretary's denial of disability benefits, the District Court for the Eastern District of Texas reversed the Secretary and held that the plaintiff was entitled to recover. There was approximately $10,000 in accrued benefits to the date of judgment. Upon motion of the claimant's counsel, the court fixed a reasonable attorney's fee and directed the Secretary to certify for payment of the accrued benefits to the claimant and his counsel jointly. The Secretary appealed solely from this latter direction, maintaining that the court's order would require him to violate 42 U.S.C. 405(i), which provided for certification of the claimant only, and that the court's order also violated 42 U.S.C. 407 as an assignment or transfer of a payment due under the Act or a subjection of such moneys to legal process.

The Court of Appeals affirmed. It held that the review section, 42 U.S.C. 405(g), conferred upon the district court "full power to deal with the litigation brought to it under that section, including the power, in appropriate cases, to provide for the payment from the past due benefits recovered by the claimant in the litigation of counsel fees for conducting it." It reasoned that a disabled and probably dependent claimant was in need of counsel to assist him in prosecuting his claim; that the fund realized by the attorney's efforts was quite probably the only source of payment for the services rendered; and that Congress did not intend by the certification section, 42 U.S.C. 405(i), to preclude payment of allowable attorneys' fees. Further, the Court held that the order did not amount to an assignment or transfer of the payments as prohibited in 42 U.S.C. 407, and that, in any event, that section applied only to "future payments," whereas the court's order dealt solely with past due benefits.

Staff: Kathryn Baldwin (Civil Division)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

Government Not Liable for Fall of 71 Year Old Female on Steps of N.C.O. Club Since Lighting Adequate and No Conditions of Peculiar Danger Existed. Cusack v. United States (Eastern District of New York, March 12, 1965). D.J. File 157-52-972. Mr. and Mrs. Cusack sued the Government under the Tort Claims Act for $120,000 alleging serious injuries sustained as the result of falling down ten concrete steps at about 10:30 p.m. after attending a wedding reception at a Non-Commissioned Officers' Club, Fort Totten, New York. Plaintiffs alleged that the Government maintained the entranceway in a dangerous condition in that there was insufficient light for guests to exit safely from the premises.

The Court held that under New York law the duty to light or supply other special warning exists only when there is a peculiar or defective condition making the stairway not reasonably safe for use. The Court found no such defective condition to exist in this case. The Court also found that adequate lighting did exist. The evidence showed that there was a neon sign over the entrance visible for a distance of 200 feet from the Club and a ceiling light in the Club vestibule near the entrance.

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

The decision of an Army Hospital Administrator That an Injured Employee of an Independent Contractor Working On an Army Reservation Was Not Entitled To Be Admitted to the Hospital, Could Not Be the Subject of a Suit Under the Act Since It Came Within the Express Exceptions To the Act Stated in 28 U.S.C. 2680(a). Sylvia Jean Brassette Clark, et al. v. United States (W.D. La., March 16, 1965). D.J. File 157-33-153. Jack Vernon Clark, a civilian employee of a private company, suffered a shock while doing electrical work atop a pole on the Fort Polk Military Reservation. He fell twenty-six feet striking his head on the ground. Mr. Clark, in a semiconscious and delirious condition, was rushed in an Army ambulance to the Base hospital. Two of his co-workers accompanied him. At the hospital, he was examined and given first aid. The examination disclosed that the injured man's blood pressure, respiration and pulse were normal. The doctor in attendance suspected that a concussion had been suffered, and thought Mr. Clark should be taken to a hospital where a neurosurgeon could examine him. There were no neurosurgeons at the Fort Polk Hospital. Army regulations did not permit treatment of a civilian employee of a contractor except to prevent undue suffering or loss of life. Accordingly, the hospital authorities decided that Mr. Clark should be transferred to the nearest civilian hospital. An Army ambulance was offered to take Mr. Clark to a civilian hospital in nearby Leesville. Mr. Clark's foreman refused the offer and said he wanted to have the patient taken to the Baptist Hospital in Alexandria which was near his home. This hospital was 60 miles from Fort Polk. The Army officials stated that he would have to provide his own ambulance for a trip that long. An ambulance was ordered from a nearby funeral home and the injured man was rushed to the Baptist Hospital where he died two days later.

A wrongful death action was brought against the United States alleging in substance that Mr. Clark was deprived of medical care called for under the circumstances, and this medical care would have saved his life.

The Court granted the Government's motion for summary judgment, holding that the decision to transfer the injured man was a discretionary function, excepted from the Federal Tort Claims Act. The Court also found as an additional ground that the Army officials were exercising due care in the execution of Army regulations, another exception to the Act contained in 28 U.S.C. 2680 (a). The Court stated that all the steps taken in the execution of Army regulations were in accordance with the standard of care required from physicians in Louisiana.

Staff: Edward L. Shaheen, United States Attorney (W.D. La.), and Denis E. Dillon (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General John Doar

Summary Punishment - Civil Rights. United States v. Floyd E. Gaskins (M.D. Ga.). D.J. File 144-19M-631. On July 11, 1964, Denny C. Conway, an itinerant construction worker, was arrested at Adel, Georgia, for being drunk in public. On arrival at the police station, Floyd E. Gaskins, Assistant Chief of Police, attempted to elicit from Conway his correct name. Conway demanded an opportunity to contact a lawyer and, when his request was refused, he obstinately declined to reveal his name. Irked by Conway's obstinacy, Gaskins proceeded to beat Conway, in the presence of two other police officers and a city fireman who happened to be present. As a result, Conway suffered substantial injuries, including the loss of three teeth, and suturing of his chin and lips was necessary.

In October 1964 a grand jury in the Middle District of Georgia returned an indictment charging Gaskins with having assaulted Conway under color of law with the purpose of imposing summary punishment and thereby having deprived the victim of his constitutional right to liberty without due process of law in violation of 18 U.S.C. 242. The case went to trial on March 17, 1965, and continued through March 19 when the jury, after four and one-half hours deliberation, returned a verdict of guilty as charged. The Court sentenced defendant to a fine of $500 and placed him on probation for a period of five years.

Staff: United States Attorney Floyd M. Buford; John L. Murphy (Civil Rights Division).

Violation of Fugitive Felon Act (18 U.S.C. 2 and 1073). (D. Md.). United States v. Clarence Herschell Dale Redin. D.J. File 126-35-19.

On May 28, 1963, a federal grand jury sitting in Baltimore, Maryland returned an indictment against Clarence Herschell Dale Redin for a violation of 18 U.S.C. 2 and 1073. The indictment charged Redin with aiding and abetting another to move in interstate commerce to avoid custody and confinement after the other person had been convicted of grand larceny, a felony under the laws of the State of Maryland.

The evidence indicated that after the fugitive escaped from a county jail Redin took him in his automobile to a location in Maryland where he mapped out a route to a small town in Louisiana and then accompanied the fugitive to a truck stop where he arranged with a truck driver to take the fugitive almost to his destination.

Federal prosecution was authorized after it was determined that the State of Maryland had no intention to prosecute. Defendant was tried by the Court without a jury and was found guilty. The Court suspended imposition of sentence and placed defendant on probation for one year. This is the first case to be tried in the District of Maryland under the Fugitive Felon Act.

It is noted that paragraph 2 of Section 1073 requires the written approval of the Attorney General or an Assistant Attorney General for a prosecution thereunder. Pursuant to the statute the written authorization was placed in evidence.

Staff: Assistant United States Attorneys Arthur G. Murphy and Roger C. Duncan (D. Md.)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

BANKRUPTCY

Fraud; Transfer of Assets. United States v. Murray Frank Peroff and Irwin West (S.D. Fla.) DJ File 49-18-397. The defendants were charged in several counts with transfers of property in contemplation of bankruptcy. They moved to dismiss the indictment alleging, inter alia, that transfer or concealment of property is one offense, no matter how many different items are involved. Reliance was placed on Edwards v. United States, 265 F. 2d 302 (C.A. 9, 1959), and Bisno v. United States, 299 F. 2d 711 (C.A. 9, 1961), certiorari denied, 370 U.S. 952. In the Government's opposition to the motion to dismiss, it was pointed out that, in Edwards and Bisno, the defendants had been charged under the first paragraph of 18 U.S.C. 152 with concealments from the receiver or trustee: in the instant case, the charges were under paragraph six of that section and each transfer in contemplation of bankruptcy is a separate offense. The motion to dismiss the indictment was denied.

Staff: United States Attorney William A. Meadows, Jr.; Assistant United States Attorney James O. Murphy, Jr. (S.D. Fla.).

FALSE STATEMENTS

Suggested Use of 18 U.S.C. 1382 in Prosecution of False Statements Involving Military Installations. United States v. Alton Claude Allen (S.D. Ill.). DJ File 46-25-79. A complaint was filed before the United States Commissioner, Rock Island, Illinois, charging defendant with a violation of 18 U.S.C. 1382. That statute imposes a maximum $500 fine or six months sentence, or both upon "Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation . . ." In the instant case Allen was charged with going upon the Rock Island Arsenal, for a purpose prohibited by law, to wit; to make a fake fictitious and fraudulent statement and representation to the Department of the Army, in an application for employment there. Upon his plea of guilty he was fined $15.

Very often United States Attorneys hesitate to utilize 18 U.S.C. 1001, a felony statute, to punish false statements made in various documents, including application forms, that may be submitted to the government. We think, at least in those situations involving military installations, 18 U.S.C. 1382 may afford a worthwhile alternative consideration for instituting criminal proceedings.

SUBPOENA DUCES TECUM

Injunction. District Court Refuses to Enjoin Compliance with Subpoena Duces Tecum Issued by Another District Court. Milton Luros v. Donald Schoof, Postal Inspector of the City of Los Angeles, et al. (S.D. Calif., February 18, 1965). D.J. File 145-5-2869. Plaintiff sued in the U. S. District Court, Southern District of California, for an injunction and damages against a postal inspector, a Los Angeles County prosecutor, a California corporation and a bank

in connection with an obscenity investigation of plaintiff's nudist publications. Insofar as relevant here, he sought to enjoin Sun Era, Inc., a California corporation in the S.D. of California, solely owned by plaintiff, to prevent compliance with a subpoena duces tecum issued out of the U.S. District Court, N.D. of Iowa. The subpoena sought numerous, if not all, documents, papers and records of the plaintiff's corporation. Plaintiff raised a number of issues, including constitutional issues of search and seizure and self-incrimination, in what the California District Court acknowledged to be essentially an effort to quash the Iowa District Court subpoena.

The California Court relied on the tenor of Meltzer v. United States, 188 F. 2d 913 (C.A. 9, 1951), in dissolving the temporary restraining order and denying the injunction. That case arose in the Southern District of California where Meltzer attempted to nullify the effect of a bench warrant issued for his arrest out of the Southern District of New York where he was under indictment, by seeking a Writ of Habeas Corpus in the Southern District of California.

While the principal ground upon which the Writ was sought was that the United States Commissioner had fixed too large a bail, the United States Court of Appeals for the Ninth Circuit nevertheless commented on the comity which should exist between courts, and said, at page 915:

> Neither this court nor any court in California should attempt to interfere with valid process of the District Court of the Southern District of New York. Such an attempt would bring about an unseemly conflict between two federal courts. If defendant has a remedy against bail alleged to be excessive, he should apply to the courts of the Second Circuit.

The California District Court also noted that Rule 17(c), Federal Rules of Criminal Procedure, provides that the "court" may quash or modify a subpoena. "Obviously this refers to the court where the subpoena was issued," said the Court. The Court ruled that it would be an unwarranted intrusion by itself upon the power and jurisdiction of the Iowa District Court if it enjoined compliance with the subpoena issued by the latter court upon the California corporation. No appeal has been noted.

Staff: United States Attorney Manuel L. Real; Assistant United States Attorney James R. Dooley (S.D. Calif.).

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Criminal Section

Conspiracy, Misuse of Passport and Departure from the United States. United States v. Morris and Mollie Block (E.D. N.Y.) D.J. File 146-1-51-2696. On June 25, 1964, the defendants, Morris and Mollie Block, pleaded not guilty to a ten-count indictment charging them in Count 1 with conspiracy to violate Sections 1542 and 1544 of Title 18, and Section 1185(b) of Title 8, United States Code, and charging Morris Block in the other nine counts with the substantive violations of these statutes. On September 3, 1964, the defendant, Morris Block, entered a plea of guilty to Count 2 of the indictment which charged him with an attempt to use a United States passport issued by reason of false statements in violation of 18 U.S.C. 1542. He was committed on October 8, 1964 to the custody of the Attorney General for observation and report under 18 U.S.C. 4208(b). On March 8, 1965, the defendant, Morris Block, was sentenced on Count 2 of the indictment to five years probation under 18 U.S.C. 4208(a)(2). Counts 1, 3 through 10 were dismissed as well as the indictment against the other defendant, Mollie Block.

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

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LANDS DIVISION

Acting Assistant Attorney General J. Edward Williams

Public Lands: Removal of Lateral Support; Liability of Surety to Third-Party Tort Claimants; Arkansas Direct Action Statute. Tri-State Insurance Company v. United States, 340 F.2d 542 (C.A. 8, 1965), (D.J. File No. 90-1-23-949). - The United States sued Tri-State Insurance Company, Capital Construction Company and Baptist Golden Age Home for damages to National Park land caused by the removal of lateral support. Tri-State executed a surety bond with Capital and Baptist, guaranteeing Baptist that Capital would "well and truly perform" a construction contract on private property adjoining the park. In the course of the construction, Capital removed the lateral support for a portion of the park land and the land collapsed. Thereafter, Capital defaulted on the construction contract and Tri-State completed the contract. The contract contemplated the removal of the lateral support but called for a retaining wall to replace the support; however, the land collapsed before the support could be replaced. The United States recovered a judgment against Tri-State and Capital, and Tri-State appealed.

The Eighth Circuit reversed, holding that "appellant's liability on the bond as written should not be extended to afford protection to such a claimant as appellee [United States] who seeks to recover damages from the surety for the tortious injury to its land." The Court ruled: (1) Tri-State's surety agreement cannot be treated as an all risks policy of liability insurance for the benefit of third party tort claimants such as the United States; the policy must be limited to beneficiaries specifically named; (2) even if the bond was for the benefit of third parties such as the United States, their rights would rise no higher than the rights of Baptist and Baptist would not have an action against the surety company because the failure to replace the lateral support before the landslide was the result of specific instructions from Baptist; and (3) the Arkansas Direct Action Statute gives a cause of action to the United States only if Baptist had one.

Staff: Richard N. Countiss (Lands Division).

Condemnation: Right of the United States to Condemn School Lands as a Part of the Interstate and Defense Highway System at the Request of the Virginia Highway Department. United States v. Board of Trustees of The James Barry-Robinson Home for Boys, Etc., Appellant, C.A. 4, March 10, 1965 (D.J. File No. 33-48-738). - The Court of Appeals of the Fourth Circuit affirmed per curiam the interlocutory summary judgment of Judge Walter Hoffman upholding the Government's right to take this school property for an interchange on Interstate Route No. 64, at the request of the state and upon compliance with the Federal-Aid Highway Act, 23 U.S.C. sec. 107. The District Court, on motion of the Government, lifted its stay of the order of possession and the only question now before the Court is the determination of just compensation.

Staff: Roger P. Marquis and Anne S. Bell (Lands Division).

Lands: Findings of District Court on Boundary Dispute Involving Indian Reservation Upheld on Appeal. United States v. Cline, C.A. 4, decided March 25, 1965 (D.J. File No. 90-2-10-30-80). - By deed dated July 1, 1924, the Eastern Band of Cherokee Indians conveyed a tract of land lying on the Oconaluftee River to the Town of Bryson City, North Carolina. Bryson City proposed to build a dam across the river for hydroelectric purposes and the land purchased from the Cherokees was to be the upper river area covered by impounded waters. The remainder of the Reservation was subsequently conveyed to the United States in trust for the Indians. The United States brought this action in 1961 against Mr. and Mrs. Cline to eject them from certain lands they occupied near the boundary of the Cherokee Reservation. By stipulation it was agreed that, to the extent the lands occupied by the Clines had not been conveyed by the 1924 deed to Bryson City, it was in the United States in trust for the Cherokees and ejectment would be proper.

At the first trial, the District Court held for the United States. United States v. Cline, 199 F.Supp. 676 (W.D.N.C. 1961). This was reversed on appeal because the trial court had not considered a plat offered in evidence. United States v. Cline, 307 F.2d 282 (C.A. 4, 1962). 10 U.S. Attys. Bull. No. 20, p. 574. On remand, the case was retried, and the District Court held that the boundary line intended by the 1924 deed was the contour line that ran at 1837.41 feet elevation, m.s.l. United States v. Cline, 225 F. Supp. 488 (W.D. N.C. 1964). On appeal, this was affirmed. The court of appeals held the district court's decision "was purely a factual resolution of complex and conflicting proof," which was not "clearly erroneous." Therefore, the ascertainment of the lower court was upheld.

Staff: A. Donald Mileur (Lands Division).

Practice and Procedure: Joinder of United States and Government Officials as Involuntary Plaintiffs Under Rule 19(a), F.R.Civ.P., Improper as Being Unconsented Suit Against the United States; Complaint Dismissed as to Such Involuntary Plaintiffs. Robert A. Whitebird, et al. v. Eagle-Picher Company, Civil No. 5929 N.D. Okla., March 29, 1965, D.J. File No. 90-2-18-94. - This action was brought by several Quapaw Indians for an accounting from the defendant, which is the lessee under certain lead and zinc mining leases covering plaintiffs' restricted allotments in Ottawa County, Oklahoma, and for the payment of royalties allegedly due for the removal of minerals other than lead and zinc from the allotments (Germanium, Cadmium, Sulphur, Gallium and Indium). The plaintiffs also demanded an accounting from the defendants for the lead and zinc removed from their lands. In their complaint the plaintiffs purported to join the Secretary of the Interior, the Commissioner of Indian Affairs, the Area Director at Muskogee, Oklahoma, and the United States as involuntary plaintiffs in the action. The Government filed a motion to dismiss the complaint as to the involuntary plaintiffs for lack of jurisdiction.

On March 29, 1965, the court sustained the motion and dismissed the involuntary plaintiffs from the action upon the ground that the attempt to join the involuntary plaintiffs was a suit against the United States to which consent had not been given and stated that the joinder of the individual involuntary plaintiffs would not be permitted without the consent of the United States, since the request for relief against them was in effect an action against the sovereign.

In support of its decision, the court cited Choctaw and Chickasaw Nations v. Seitz, 193 F.2d 456 (C.A. 10, 1952) and Skokomish Indian Tribe v. France, 269 F.2d 555 (C.A. 9, 1959).

Staff: United States Attorney John M. Imel and Assistant United States Attorney Lawrence A. McSoud (N.D. Oklahoma).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Quiet Title Suits Under 28 U.S.C., Section 2410, to Remove the Alleged "Cloud" of a Federal Tax Lien on Title to Property May Not be Maintained As a Vehicle to Dispute the Validity of the Underlying Assessment. United States v. Falik, (C.A. 2d, No. 368, decided March 18, 1965, reversing 206 F. Supp. 181 (E.D. N.Y.); Quinn v. Hook, (C.A. 3d, No. 15017), decided March 12, 1965, affirming per curiam, 231 F. Supp. 718 (E.D. Pa.); Broadwell v. United States, (C.A. 4th, Nos. 9751 and 9752), decided March 8, 1965, affirming per curiam, 234 F. Supp. 17 (E.D. N.C.). In each of these cases the taxpayer tried to secure a judicial determination of his federal tax liability under the guise of a suit to quiet title to his property by removal of the alleged cloud of the federal tax lien through the medium of a suit under 28 U.S.C., Section 2410. That statute waives the sovereign immunity of the United States to suit by consenting, under prescribed conditions, to be named a party in any civil action or suit in any district court, or state court having jurisdiction of the subject matter, "to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." Jurisdiction was variously alleged to exist under 28 U.S.C., Sections 1330, 1331, 1340 and 2463. In each case, it was held that Section 2410 was not available for the purpose for which it was invoked because neither the language of the statute or its legislative history indicated that such was the intent of Congress. Support for this conclusion was found in the fact that Congress has provided an entirely adequate system for securing a judicial determination of one's tax liability by way of a suit for refund of taxes paid (Section 7422 of the 1954 Code) and by petition to the Tax Court, without the necessity of first paying the taxes. Further support was found in the fact that such a quiet title suit was in effect a suit for a declaratory judgment, forbidden by 28 U.S.C., Section 2201, with respect to federal taxes. Although the Second Circuit held that jurisdiction to maintain a Section 2410 action was afforded by Section 1340 (as an action "arising under any Act of Congress providing for internal revenue * * *"), it nevertheless concluded that the provisions of Section 2410 did not extend to a suit to determine the merits of the assessment underlying the tax lien, and, hence, that the complaint in the Falik case failed to state a claim upon which relief could be granted. While the decisions by the Third and Fourth Circuits can be read as resting on the same ground, neither court expressly found any basis for jurisdiction. While the Second Circuit based its decision on failure to state a claim for relief, the alternative basis for decision, also suggested by the Government, is that Section 7421 of the 1954 Code and 28 U.S.C., Section 2201, constitute a specific withdrawal of any jurisdiction afforded by Section 1340, or any other provision of the Judicial Code, insofar as taxpayers' suits for injunctive, declaratory or quiet title relief are concerned. See Enochs v. Williams Packing Co., 370 U.S. 1, 5, and Flora v. United States, 362 U.S. 145, 164-165.

In the Quinn and Broadwell cases, the taxpayers also sought injunctive relief against the assessment and collection of the taxes (notwithstanding the bar of 1954 Code Section 7421(a), and the rule of the Williams Packing Co. case) on the theory that 28 U.S.C., Section 2410, created a new remedy; both courts rejected the contention and held that the taxpayers had failed to meet the dual requirements of the Williams Packing rule.

Staff: Joseph Kovner, Harold C. Wilkenfeld, George F. Lynch (Tax Division)

District Court Decisions

Conversion of Tax Lien; Equipment Seller Who Illegally Repossessed and Resold Property After a Federal Tax Lien for Taxes Owed by the Purchaser Had Attached to the Property Held Liable to the Extent of the Fair Market Value of the Property at the Time of Repossession. United States v. Webster-Robinson Machinery and Supply Co., Inc. (W.D. Wash., February 9, 1965). (CCH 65-1 U.S.T.C. ¶9225). In April of 1959, the taxpayer ordered machinery from Webster-Robinson Machinery and Supply Co., Inc., on open account, but the document which purported to be a conditional sales contract was not filed and recorded under the provisions of Washington law. An assessment of income taxes was made against the taxpayer on August 14, 1959, and on that date the items of machinery in question were on the taxpayer's premises. However, on August 21, 1959, these items were repossessed by Webster-Robinson without authority or permission. Notice of Tax Lien was filed on November 6, 1959, and Webster-Robinson resold items of the repossessed machinery both before and after that date. A Notice of Levy and a copy of the Notice of Tax Lien were served upon Webster-Robinson on November 20, 1959, at which time one item of machinery had not yet been resold.

After trial, the District Court ruled that there was no valid conditional sales contract between the taxpayer and Webster-Robinson; that the document which was executed was not recorded and was, therefore, ineffective as to third parties; that the equipment had become the property of the taxpayer at the time it was delivered; and that the tax lien had attached to the equipment and Webster-Robinson had wrongfully converted the Government's interest in the equipment by virtue of its lien. The Court, therefore, determined that the Government was entitled to the fair market value of the equipment on the date that it was unlawfully repossessed, plus interest on the value of the item of machinery resold after the time Webster-Robinson had actual notice of the Government's tax liens.

Staff: United States Attorney William N. Goodwin, Assistant United States Attorney Dale L. Carlisle (W.D. Wash.)

Federal Tax Liens; Appointment of Receiver; United States Entitled to Receiver for Corporation Solely Owned by Taxpayer to Assist in Foreclosure of Tax Liens. United States v. Michael Dalessio, et al. (E.D. N.Y., February 9, 1965). (CCH 65-1 U.S.T.C. ¶9243). The Government instituted this lien foreclosure action against the stock of the taxpayer in his solely-owned corporation.

The corporation's only asset, insofar as the Government was aware, was certain realty. A mortgagee of the corporation had obtained a foreclosure of his mortgage against that realty in a separate action and the realty was ordered sold pursuant to that judgment. It was anticipated that the foreclosure sale in that action would produce proceeds considerably in excess of the amount of the mortgage, and, in the surplus money proceeding which would follow, the Government would have to rely on a mortgage on the corporation's realty given to the Government by the taxpayer to secure his individual liability. Because there were possible defects in the mortgage given to the Government, the appointment of a receiver for the corporation in this action, to foreclose tax liens against the stock in the corporation, was sought. The purpose of obtaining a receiver for the corporation was to assert the corporation's interest to the proceeds of the sale in the surplus money proceeding involving the distribution of the excess over the amount of the mortgage foreclosed in the other action, thereby insuring a recovery to the Government in the event that the mortgage given to the Government was successfully challenged. Also, a receiver could liquidate the corporation and apply the proceeds, after satisfaction of legitimate creditors, to the taxpayer's outstanding liabilities.

In granting the Government's application for the appointment of a receiver for the corporation, the Court noted that the Commissioner of Internal Revenue had certified, pursuant to Section 7403(d) of the Internal Revenue Code of 1954, that it was in the public interest that a receiver be appointed; that the Government held all of the stock of the corporation as security for the taxpayer's indebtedness under an assignment of the stock by the defendant; that a receiver could ascertain whether there were assets of the corporation other than the realty; and that the inconvenience to the corporation was extremely slight.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Michael Walsh (E.D. N.Y.); and John F. Beggan (Tax Division)

Internal Revenue Summons; Failure to Raise Attorney-Client Privilege as Defense to Initial Summons Enforcement Proceeding Held to be a Waiver of the Defense and Such Privilege Held to be Inapplicable to Divulging Name of Attorney's Client. Tillotson v. Boughner. (N.D. Ill., February 23, 1965). (CCH 65-1 U.S.T.C. ¶9261). This proceeding to enforce an Internal Revenue summons was precipitated when the respondent, an attorney engaged by the taxpayer's counsel, delivered a cashier's check to the Internal Revenue Service in the sum of $215,499.95, representing an income tax deficiency owed by an unnamed taxpayer.

When the respondent refused to identify the person who had engaged his services, a summons was issued to him, and later an enforcement proceeding was brought to compel disclosure. In the initial enforcement action, the respondent raised only one defense, viz., the question of the validity of an Internal Revenue summons which does not name the taxpayer under investigation. The District Court found the summons to be valid and directed compliance. Tillotson v. Boughner, 225 F. Supp. 45 (N.D. Ill.), and the decision was affirmed, 333 F. 2d 513 (C.A. 7th), and certiorari was denied, 379 U.S. 913. This proceeding was commenced when the respondent asserted an attorney-client privilege as a

defense to compliance with the summons. The Court held that a defense based upon the attorney-client privilege could have been asserted in the initial enforcement proceeding, and, since it was not, it was deemed waived under the provisions of Rule 12 (g) and (h) of the Federal Rules of Civil Procedure, which provide, with certain exceptions not here relevant, that a party waives all defenses and objections not raised at one time. Alternatively, it was held that under both Illinois and federal law the questions concerning the identity of the person for whom the respondent acted in depositing the check under investigation were not subject to the attorney-client privilege.

In so ruling, the District Court noted the time which had been consumed in this matter, and, in criticizing the practice of fragmented litigation in the summons enforcement area, stated: "The law does not function in a vacuum, and the courts are not maintained to provide counsel a forum in which to demonstrate their skill in legal gamesmanship."

In this proceeding, unlike the original one, the order of compliance recited that "the Court hereby expressly retains jurisdiction of this cause until such time as the Court is advised as to whether the respondent has answered the questions...[or]until such time as the Court enters appropriate sanctions." When the respondent refused to comply, a contempt citation followed; he was held in contempt; and a $100 per day fine was imposed for each day that he remained in contempt. An appeal has been noted by the respondent and a stay of the penalty pending the appeal has been granted, conditioned upon the posting of a $5,000 bond to insure payment of the accruing penalty if the decision is affirmed.

Staff: United States Attorney Edward V. Hanrahan; Assistant United States Attorney Thomas Curoe (N.D. Ill.); and Robert A. Maloney (Tax Division)

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