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UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 13 June 11, 1965 No. 12

APPOINTMENTS--UNITED STATES ATTORNEYS

In addition to those listed in the last issue of the Bulletin, the nomination of the following United States Attorney to a new four-year term was pending before the Senate as of June 3, 1965:

Tennessee, Eastern--John H. Reddy

MONTHLY TOTALS

The figures below show the continuing gap between cases filed and cases terminated. During the ten months ended April 30, 1965, the United States Attorneys' offices had filed 8 per cent more criminal cases than had been terminated, and had filed 6 per cent more civil cases than had been terminated. If the figures for May and June show a continuation of the same trend, fiscal 1966 will reflect a larger increase in the pending case-load than in any of the preceding 11 fiscal years. Following is a table giving a comparison of the cases filed, terminated and pending during the first 10 months of fiscal 1964 and 1965.

	First 10 Months Fiscal Year 1964	First 10 Months Fiscal Year 1965	Increase or Decrease Number	%
Filed				
Criminal	28,142	28,188	+ 46	+ .16
Civil	23,586	23,967	+ 381	+ 1.62
Total	51,728	52,155	+ 427	+ .83
Terminated				
Criminal	26,851	25,899	- 952	- 3.55
Civil	22,174	22,528	+ 354	+ 1.60
Total	49,025	48,427	- 598	- 1.22
Pending				
Criminal	11,083	12,256	+ 1,173	+ 10.58
Civil	23,730	24,500	+ 770	+ 3.24
Total	34,813	36,756	+ 1,943	+ 5.58

Although terminations in March and April were greater than in any of the preceding months of fiscal 1966, filings also increased during these two months and still exceeded the rate of terminations. So far, in fiscal 1965, terminations have exceeded filings in only one month.

	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

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
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
Mar.	3,337	2,780	6,117	3,281	2,490	5,771
Apr.	3,142	2,912	6,054	3,055	2,608	5,663

For the month of April, 1965, United States Attorneys reported collections of $4,003,485. This brings the total for the first ten months of this fiscal year to $53,325,958. Compared with the first ten months of the previous fiscal year this is an increase of $6,287,887 or 13.37 per cent over the $47,038,071 collected during that period. If this rate of increase holds good until the end of the fiscal year, collections will top $60. million for the first time in the history of the Department.

During April, 1965, $11,295,174 was saved in 119 suits in which the government as defendant was sued for $11,803,378. 69 of them involving $8,252,159 were closed by compromises amounting to $366,179 and 12 of them involving $741,521 were closed by judgments amounting to $142,025. The remaining 26 suits involving $2,809,698 were won by the government. The total saved for the first ten months of the current fiscal year aggregated $93,205,921 and is an increase of $29,569,599 or 46.47 per cent over the $63,636,322 saved in the first ten months of fiscal year 1965.

The cost of operating United States Attorneys' offices for the first ten months of fiscal year 1965 amounted to $15,592,282 as compared to $14,425,448 for the first ten months of fiscal year 1964. This increase in operating costs has not been accompanied by an increase in production as, in terms of cases filed and terminated, total volume has been below that of the comparable period of fiscal 1964.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of April 30, 1965.

CASES

Criminal

Ala., N.	Fla., S.	Iowa, N.	Mo., E	N.C., E.
Ala., S.	Ga., N.	Iowa, S.	Mont.	N.C., M.
Alaska	Ga., M.	Kan.	Neb.	N.D.
Ariz.	Ga., S.	Ky., W.	Nev.	Ohio, N.
Ark., W.	Hawaii	La., W.	N.H.	Ohio, S.
Calif., S.	Idaho	Md.	N.J.	Okla., N.
Colo.	Ill., N.	Mass.	N.Mex.	Okla., E.
Conn.	Ill., E.	Mich., E.	N.Y., N.	Okla., W.
Del.	Ill., S.	Mich., W.	N.Y., E.	Ore.
Dist.of Col.	Ind., N.	Minn.	N.Y., S.	Pa., E.
Fla., N.	Ind., S.	Miss., N.	N.Y., W.	Pa., W.

CASES (cont.)

Criminal (cont.)

P.R.	Tenn., W.	Tex., S.	Va., W.	W.Va., S.
R.I.	Tex., E.	Tex., W.	Wash., E.	Wis., E.
Tenn., E.	Tex., N.	Utah	Wash., W.	C.Z.
Tenn., M.				Guam

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

MATTERS (cont.)

Civil (cont.)

Idaho	Mass.	N.Mex.	R.I.	Vt.
Ill., N.	Mich., E.	N.Y., S.	S.C., E.	Va., E.
Ill., E.	Mich., W.	N.C., M.	S.C., W.	Va., W.
Ill., S.	Miss., N.	N.C., W.	S.D.	Wash., E.
Ind., N.	Miss., S.	N.D.	Tenn., E.	Wash., W.
Ind., S.	Mo., E.	Ohio, N.	Tenn., M.	W.Va., N.
Iowa, N.	Mo., W.	Ohio, S.	Tenn., W.	W.Va., S.
Iowa, S.	Mont.	Okla., E.	Tex., N.	Wis., E.
Kan.	Neb.	Okla., W.	Tex., E.	Wis., W.
Ky., W.	Nev.	Pa., E.	Tex., S.	Wyo.
La., W.	N.H.	Pa., M.	Tex., W.	C.Z.
Me.	N.J.	Pa., W.	Utah	Guam
Md.				V.I.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Scientific Supplies Companies Charged With Violation of Section 1 of Sherman Act and Section 7 of Clayton Act. United States v. American Hospital Supply Corporation, et al. (N.D. Texas) D.J. File 60-0-37-838. A civil complaint was filed in the Northern District of Texas, Dallas Division, seeking to enjoin American Hospital Supply Corporation from acquiring the assets of W. H. Curtin & Company. The complaint alleges violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act. American Hospital is one of the largest scientific supply distributors in the country. Curtin, according to the complaint, is the largest distributor of scientific supplies in the eleven-State area which includes Texas, Oklahoma, Louisiana, Arkansas, Alabama, Mississippi, Georgia, Florida, North Carolina, South Carolina, and Tennessee.

The line of commerce is described in the complaint as:

> "Scientific supplies" means apparatus, equipment, specialized furniture and other related supplies, including chemicals, used primarily in laboratories engaged in biological, chemical, agricultural, medical, and physical science research, quality control and education. [p. 2]

The line of commerce includes several thousand different items ranging from test tube corks and Bunsen burners to highly sophisticated equipment such as electron microscopes and colorimeters. Both American Hospital and Curtin, as distributors, fulfill a unique role in the scientific supply industry. They are so-called "full line" houses which are able to supply these thousands of items promptly and on a continuing basis. This differentiates full line distributors from small specialty houses and manufacturers who sell directly to laboratories. Neither of the latter is able to provide this prompt continuous service and readily available replacement of expendables.

The complaint alleges if American Hospital were to acquire Curtin, American Hospital would become the largest scientific supply distributor in the United States and in the eleven-State area.

Effects of this proposed acquisition may be substantially to lessen or to eliminate actual and potential competition in the manufacture, distribution and sale of scientific supplies in the United States and in the eleven-State area and portions thereof; to foreclose manufacturers of scientific supplies from distribution and sales outlets; unduly to increase concentration in the scientific supply industry; unduly to enhance American Hospital's competitive advantages in the industry; and to foster the cumulative process of mergers and acquisitions in the industry.

Defendants have consented to an order enjoining the merger until a full hearing can be had on the merits, subject to the right of any party upon

thirty days notice to make application to the court to vacate or modify the order.

Staff: John E. Sarbaugh, Lawrence H. Eiger, Howard L. Fink and Patricia M. Lines (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

SUPREME COURT

ADMINISTRATIVE LAW

Administrative Agency Has Discretion to Fashion Rules of Procedure Which Are Valid Unless Shown to Be Inconsistent With Statute Or Constitution; FCC May Order Public Proceedings Unless Need for Confidential Proceedings Is Shown. FCC v. Schreiber (No. 482, Oct. Term, 1964, May 24, 1965) D.J. No. 82-12-111. During an investigation of television network program procurement, the FCC issued a subpoena directing MCA, Inc., a film producer and talent agent, to produce a list of programs with regard to which it had acted as packager or selling agent. MCA refused to produce the list unless it were taken in confidence. MCA claimed, without a factual showing, that the list was a business secret the disclosure of which would harm its business position and its relationship with clients. The FCC sought enforcement of the subpoena in the district court. The district court, viewing the record de novo, ruled that FCC must take MCA's evidence in confidence unless it could show good cause to the court for public release. The Court of Appeals affirmed, on the theory that the district court had discretion to make such an order and that there had been no abuse of that discretion.

In a unanimous decision, the Supreme Court reversed and ordered unqualified enforcement of the subpoena. The Court in broad language spelled out the power of administrative agencies to make rules governing their procedures, whether done generally, or for a specific investigation, or on an ad hoc basis for specific instances. The Court pointed out that Congress has left it to the agency involved "to design rules adapted to the peculiarities of the industry and the tasks of the agency involved." The judiciary is to interfere only to insure "consistency with governing statutes and the demands of the Constitution."

Noting that the FCC had stated in its order establishing the investigation that the inquiry would be public unless good cause were shown for confidential proceedings, the Supreme Court held that the Commission had discretion (1) to require open proceedings unless good cause were shown for in camera procedures and (2) to place the burden of justifying in camera procedures on the proponents of confidentiality. The Court limited district courts to reviewing the Commission's exercise of discretion solely for unreasonableness and arbitrariness, and held that the FCC's rejection of MCA's request for confidential treatment was neither unreasonable nor arbitrary in light of a record devoid of any factual showing justifying the need for such treatment.

Staff: Assistant Attorney General John W. Douglas; Sherman L. Cohn; Harvey L. Zuckman (Civil Division)

COURT OF APPEALS

COMMODITY CREDIT CORPORATION

Government Held Not Damaged by Contractor's Breach in Delivering Cornmeal Adulterated by Rodent Excreta Since Cornmeal Was Rejected at Destination in Italy Because It Contained Mold Fungus Which Was Unrelated to Breach of Contract. United States v. Mt. Vernon Milling Co. (C.A. 7, No. 14923, April 30, 1965) D.J. No. 120-26S-106. The Commodity Credit Corporation (CCC) contracted with defendant to have corn owned by CCC milled into 1,000,000 pounds of cornmeal for shipment to Italy as a gift of food. While the cornmeal was being transported to Italy on board an ocean vessel, an inspection report indicated that prior to shipment half of the cornmeal was contaminated by rodent excreta. After arrival in Naples, local health authorities declared the meal unfit for human consumption because it contained mold fungus. The Government sued for breach of contract. The defendant moved for summary judgment, relying upon an affidavit asserting that there is no causal connection between rodent excreta and mold fungus. In response the Government asserted that it was damaged by defendant's breach, for its right to recover against the ocean carrier is limited to the difference between the value of the cornmeal as received on board the vessel and for its value as unloaded at its destination in a moldy condition. As defendant's action resulted in cornmeal unfit for human consumption to be delivered to the carrier, the Government would have no right to recover against the carrier.

The district court entered summary judgment against the United States on the ground that it had failed to establish that defendant's breach of contract caused it any damage. The Court of Appeals affirmed on the ground that the Government had failed to establish that its damages were caused by the rodent excreta rather than the mold fungus. Judge Kiley dissented upon the basis that the Government was damaged to the extent of the difference between the unadulterated cornmeal and the cornmeal adulterated by the rodent excreta. Judge Kiley also pointed out that

> The majority decision leaves defendant with the price plaintiff paid it for processing uncontaminated meal, plaintiff with the greatly diminished if not destroyed liability of the shipowner for its breach, and settles the loss on plaintiff, the only innocent person involved.

Staff: Martin Jacobs (Civil Division)

SOCIAL SECURITY ACT

Finding by Hearing Examiner That Claimant Was Not Bona Fide Employee of Her Son Held Supported by Substantial Evidence. Sabbagha v. Celebrezze (C.A. 4, No. 9709, April 23, 1965) D.J. No. 137-67-69. Claimant was a 68-year old woman who, previous to the alleged employment by her son, had no prior work experience except for three months as a cashier in a cafe. She

claimed that she was employed by her son in the home that they shared, answering the telephone, receiving rent payment, making appointments and taking notice of other minor details of her son's business. The district court held that the Secretary's determination was not supported by substantial evidence.

The Court of Appeals reversed, noting that there was basis for the Secretary's determination that an elderly woman, with virtually no work experience, who could neither read nor write English and who had been sick during at least a part of the alleged period of employment, was not the bona fide employee of her son.

Staff: Walter H. Fleischer (Civil Division)

Denial of Social Security Disability Benefits Held Not Supported by Substantial Evidence. Clyde Dillon v. Celebrezze (C.A. 4, No. 9763, May 4, 1965) D.J. No. 137-84-88. Claimant, a 54-year-old illiterate coal miner, sought benefits and a period of disability on the basis of alleged impairments of the heart, lungs and back. The objective medical evidence was conflicting as to the existence of heart disease. There was no conflict as to the existence of arthritis and probable disc degeneration in the lumbar region of the spine and emphysema, bronchitis, bronchiectasis and silicosis of the pulmonary system, but the evidence as to the severity of these conditions was in conflict.

The Secretary found that claimant suffered from a mild heart condition and slight to moderate back and pulmonary impairments. He further found, in general terms, that these impairments did not preclude claimant from engaging in substantial gainful activity and, accordingly, denied benefits and a period of disability. The district court affirmed the Secretary's decision. The Court of Appeals reversed, stating that the Secretary failed to evaluate the effect of the claimant's various impairments in combination.

Staff: Harvey L. Zuckman (Civil Division)

TORT CLAIMS ACT

Negligence of Army Personnel in Issuing Pistol to Sergeant Held Not Proximate Cause of Sergeant's Intentional Shooting of Former Wife; Also, Under Particular Facts, This Was "Claim Arising Out of Assault," Under 28 U.S.C. 2680(h), Which Is Excepted From Recovery. United States v. Shively (C.A. 5, No. 20755, May 17, 1965) D.J. No. 157-19M-133. Sergeant Lancaster, stationed at Fort Benning, Georgia, had had financial and marital difficulties for some time prior to September 11, 1960. Up to September 10, plaintiff was his wife. The difficulties, including Lancaster's threats to kill plaintiff, had been discussed with Lancaster's Captain. In early August, 1960, the Captain had sought to dissuade plaintiff from divorcing Lancaster, but on September 10, she did so and on the following morning, a Sunday, Lancaster, in civilian clothes, obtained a pistol from the Sp/5 in charge of the arms room, who negligently issued the pistol in violation of the rules and practice. Lancaster thereupon

went to his former home, shot plaintiff, and committed suicide. The district court held for plaintiff.

The Court of Appeals reversed, applying Georgia law that, even though negligence may place a temptation upon a person to commit an intentional illegal act, the proximate cause of the injury is the intervening act, and not the earlier negligence. The Court distinguished an intentional intervening act from a mere intervening accident that could be anticipated.

The Court also concluded that, under the particular facts, plaintiff's claim was a "claim arising out of assault," excepted from recovery by reason of 28 U.S.C. 2680(h).

Staff: Assistant Attorney General John W. Douglas;
J. F. Bishop (Civil Division)

DISTRICT COURT

AMENDMENT OF COMPLAINT

Delay in Moving For Amendment Not Prejudicial to Defendant Where Records Had Become Unavailable Before Action Commenced. United States v. St. Paul Fire and Marine Insurance Co., et al. (S.D. N.Y., May 6, 1965) D.J. No. 77-51-2002. In an action on a surety bond by the Government on defaulted charter hire claim, a de novo determination was required as to whether or not, some fifteen years before, the principal breached two charter agreements with the United States. During the interim period the surety's records had been destroyed. The Government delayed amending the complaint for two years, but contended that, because the Government is not subject to laches in commencing this action, it is also not subject to this defense in seeking to amend its complaint.

The Court conceded that in this specific case the contentions of the United States are technically valid. It held that, since both the records of the defendant and the information of the principal on the bond had become unavailable to the defendant by the time the action was commenced, the additional delay of the Government in moving to amend the complaint did not place the defendant in any worse position.

Staff: Gilbert S. Fleischer (Civil Division)

TORT CLAIMS ACT

Plaintiff Who Slipped on Wet Leaves on Steps of Post Office Building Found Contributorily Negligent. Havener, et al. v. United States (D. Conn., April 29, 1965) D.J. No. 157-14-278. Plaintiff fell on the steps of a Post Office building. The steps were over eight feet wide and a handrail was provided at the extreme left-hand side of the steps. The fall occurred on the left edge of the bottom step where a pile of wet leaves had accumulated.

The Court found that the Government was negligent but also found that plaintiff was contributorily negligent. She frequently used the Post Office facilities and had noted leaves there on many prior occasions and had seen them on her way up to the stairs just prior to her accident. Plaintiff had plenty of room to descend the stairs without walking into the leaves which were only at the edges. Since she was able-bodied she did not have to use the handrail and so did not have to go to the extreme left of the stairway where the leaves were collected.

Staff: United States Attorney Jon O. Newman and Assistant United States Attorney John D. Adams (D. Conn.); Alice K. Helm (Civil Division)

Plaintiff in New York Wrongful Death Action Held to Have Reduced Burden in Proving Cause of Action But Still Must Prove Negligence and Proximate Causation. Huttner v. United States (S.D. N.Y., February 19, 1965) D.J. No. 157-51-1157. This was an action under the Federal Tort Claims Act for wrongful death of plaintiff's husband, allegedly struck and killed by a postal vehicle. Plaintiff presented several statements of the postal driver to a police officer and to a disinterested witness, as follows: "I don't know if I hit him or not," "I couldn't have hit him," or "I don't think I could have hit him." Plaintiff in addition presented the fact of the death and very little more.

The Court found that, although plaintiff's decedent may have been struck and killed by a motor vehicle, plaintiff had not sustained her burden of proving that he actually was hit by the Government postal vehicle. The "admissions" were nothing more than the speculations of an individual trying to piece together what had happened. The Court stated that, "In a death action the plaintiff is not held to as high a degree of proof of the cause of action as where the injured person can himself describe the occurrence, but this doctrine does not shift the burden of proof to the defendant." The Court cited the following case and statute: Noseworthy v. City of New York, 298 N.Y. 76, 80 (1948); New York Decedent Estate Law, Section 131.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Arthur M. Handler (S.D. N.Y.); Vincent H. Cohen (Civil Division)

Army Surgeon, Sued Personally, Not Liable for Alleged Malpractice Performed in Line of Duty at Army Hospital When Suit Brought by Enlisted Man on Active Duty. Bailey v. DeQuevedo (E.D. Pa., May 7, 1965) D.J. No. 145-4-1249. Plaintiff, an Army enlisted man sued defendant, an Army Medical Corps officer alleging malpractice. The Army doctor although sued individually was represented at his request by Government counsel. The Government counsel moved to dismiss

the action on the grounds that plaintiff's complaint failed to state a claim upon which relief may be granted. The Court granted the Government's motion to dismiss stating that "the relationship between members of the Armed Services is peculiar to the calling and, when acting within the scope of his official duties, a superior is immune from a civil action arising out of the discharge of those duties whether it be ministerial or discretionary." This District Court thus joined the Ninth Circuit which has recently issued an identical ruling. See Baily v. Van Buskirk, decided April 26, 1965 (see United States Attorneys' Bulletin, Vol. 13, No. 10, p. 216).

Staff: United States Attorney Drew J. T. O'Keefe and Assistant United States Attorney Sidney Salkin (E.D. Pa.); Vincent H. Cohen (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

NARCOTIC DRUGS

Indictments for Sale of Narcotic Drugs, Not Pursuant to Order Form, in Violation of 26 U.S.C. 4705(a), Sufficient Although Purchaser Not Named; Lauer v. United States Overturned. Richard Lee Collins v. T. Wade Markley (C.A. 7, May 11, 1965). D.J. File 12-26S-40. In October of 1962, petitioner pleaded guilty to an indictment charging the sale of narcotic drugs in violation of 26 U.S.C. 4705(a). Subsequently, he filed a motion under 28 U.S.C. 2255 to vacate and set aside the sentence and judgment against him on the ground that the indictment was defective because it failed to contain the name of the person to whom he was alleged to have sold the narcotics. The District Court ordered him discharged from custody, on the authority of Lauer v. United States, 320 F. 2d 187 (C.A. 7, 1963). In Lauer, the Court of Appeals for the Seventh Circuit held that an indictment under 26 U.S.C. 4705(a) is defective if it does not name the purchaser of the narcotics. On appeal by the Government, the Court, sitting en banc, overturned its decision in Lauer, and returned petitioner to custody. Noting the fact that since Lauer, twenty-five cases in six circuits had considered its position, and all had rejected it, the Court held that "the omission of the name of a purchaser from a charge under Title 26, United States Code, § 4705(a) is not a defect of such a fundamental nature as to render a judgment of conviction vulnerable to collateral attack." However, the Court went on to state that it did not reach the situation where, "the name of a purchaser is not stated in the indictment and the defendant, before trial, has demanded the disclosure of such name, and such name has not been disclosed.

Staff: United States Attorney Richard P. Stein; Assistant United States Attorney Robert W. Geddes (S.D. Ind.).

FRAUD

Violations of Securities Laws and Mail Fraud Statute. Gradsky v. United States, 342 F. 2d 147 (C.A. 5, 1965). D.J. File 113-18-18. With certain modifications, the Court of Appeals for the Fifth Circuit affirmed the convictions of ten co-defendants who were tried in the Southern District of Florida. Defendants were charged with conspiracy, and violations of the mail fraud statute and the anti-fraud provisions of the Securities Act of 1933, in connection with the sale of securities of Credit Finance Corporation. The securities were 8% and 12% interest-bearing notes, the interest being paid from capital. The principal defendants diverted almost $400,000 to their personal benefit.

After concluding that there was sufficient evidence to permit the jury to determine defendants' guilt of the majority of the offenses charged, the Court of Appeals found that there was no error in the district court's charge with respect to the defendants' failure to testify on their own behalf. Other claims of error were also rejected, the Court stating that the fact the scheme and

conspiracy to prey on the investing public was a complex and involved one cannot be permitted of itself to frustrate a trial where any slight errors or inconsistencies that may creep in are without prejudice to the accused persons.

The convictions of three of the appellants were set aside on some of the counts, the Court finding that the evidence did not warrant the finding of guilt on counts charging substantive crimes when they were not employed by the company. The Court noted that two of these employees had been with the company only two months (one received a sentence of 10 years and the other of 1 year), and the third was employed for eight months (sentenced to 10 years).

The principal defendant, Norman Gradsky, was sentenced to 20 years. He was also sentenced to serve 8 years in another case, and that conviction has also been affirmed. 342 F. 2d 427 (C.A. 5, 1965). Two other defendants, Robert Greve and Leonard Glaser, received 15-year sentences.

Staff: United States Attorney William A. Meadows, Jr.; Special Assistant United States Attorneys Arnold D. Levine and Mahlon M. Frankhauser (S.D. Fla.).

* * *

LANDS DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Deeds; Reservation; Clause From Individual Grantors to Police Jury of Iberia Parish, Louisiana, Not Activated by Donation of Land to United States for Public Use. Dosity Nelson, et al. v. United States (C.A. 5, May 17, 1965, No. 21733), D.J. File 33-19-294-68. In 1942, appellants or their predecessors in interest, conveyed 20 parcels of land, comprising 926 acres, to the Police Jury of Iberia Parish for use as an airport, by separate acts of sale which contained a provision that, in the event the property is no longer used as an airport, "or for any public purpose whatsoever, and the Police Jury desires to dispose of the property," the vendors shall have the privilege and option of purchasing the property for the same basic price per acre paid by the Police Jury. The airport was established and operated until 1955, when it was donated to the United States for a naval auxiliary air station. No notice was given to the appellants of the intention of the Police Jury to dispose of the property which would enable them to exercise the option to repurchase contained in the acts of sale.

A condemnation proceeding was filed in which it was sought to insure the Government's title against all persons other than the Police Jury who claimed an interest in the land. Appellants claimed a right to repurchase the land which was outstanding at the time of the taking, and sought compensation for this right. The district court granted a summary judgment dismissing appellants from the suit on the ground that they had no compensable interest in the condemned property.

Appellants argued in the Court of Appeals that their option would be activated whenever the property ceases to be used by the Police Jury for a public purpose and it desired to dispose of the property. In the alternative, they argued that the district court erroneously granted a summary judgment for the reason that the clause is ambiguous and extrinsic evidence should have been admitted to demonstrate the intention of the parties in drafting the reservation. The Government argued that the provision would activate the option only if the land were no longer used by anyone for a public purpose and the Police Jury wished to dispose of it.

The Court of Appeals affirmed, holding that the provision is unambiguous and that the case was an appropriate one for disposition by the summary judgment procedure. The Court stated: "The two conditions which must occur in order to activate the option to repurchase are expressed in the conjunctive: the land must no longer be used for any public purpose and the Police Jury must desire to dispose of it. We think it is clear that the parties did not contemplate that the option would become exercisable once the Police Jury ceased to use the land for a public purpose and desired to dispose of it. If such was the intention of the parties, there would have been no reason to include the first condition in the provision at all. Instead, it would only be necessary to condition the activation of the option on the Police Jury's desire to dispose of the property."

Staff: Elizabeth Dudley (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Decision

Income Tax Evasion; Failure to Report Funds Allegedly Embezzled in Years Subsequent to Wilcox and Rutkin But Prior to James v. United States, 366 U.S. 213; Conviction Affirmed on Ground That Rutkin Limited Wilcox to Its Facts, Which Were Unlike Facts Here. United States v. McGuire, (C.A. 6, March 23, 1965), 65-1 U.S.T.C. ¶9299. A superintendent of schools enriched himself by diverting school funds to his own pocket, yet failed to report such gains in his 1955 and 1956 income tax returns. On appeal from his conviction for tax evasion, he invoked James v. United States, 366 U.S. 213, for the view that willfulness could not be established because he could reasonably have relied on Commissioner v. Wilcox, 327 U.S. 404, in failing to report the gains. The Sixth Circuit rejected the contention, observing that Wilcox had been limited to its facts by Rutkin v. United States, 343 U.S. 130. In Wilcox, defendant was a bookkeeper who misappropriated funds which he was entrusted with the duty to collect. McGuire assured the school board that various bills for supplies should be paid, knowing that not all the supplies would be delivered and that the suppliers would either pay him the excess or would deliver the goods themselves to him for his personal use. Holding that the factual differences precluded any reasonable reliance on Wilcox the Court found it unnecessary to decide whether the acts here involved constituted embezzlement under local law. (Compare Adame's Estate v. Commissioner, 320 F. 2d 811 (C.A. 5), where the facts were closer to Wilcox since Adame was entrusted with blank signed checks, whereas McGuire was obliged to endorse false claims in order to induce the school board to authorize its treasurer to disburse school funds.) Any defense based on Wilcox will, of course, be unavailable in cases where the acts of evasion occurred after May 15, 1961, when James (overruling Wilcox) was decided. The time for seeking certiorari in McGuire has not yet expired.

Staff: John M. Brant and Joseph M. Howard
(Tax Division)

CIVIL TAX MATTERS
Appellate Decision

Enforcement of Internal Revenue Summons; Summons May Be Issued in Support of Investigation Which Might Terminate With Recommendation for Criminal Prosecution; Privilege Against Self-incrimination May Not Be Asserted by Sole Shareholder of Corporation to Prevent Production of Corporate Books and Records. John P. Wright, Special Agent v. C. Galen Detwiler (C.A. 3, No. 15,132; May 27, 1965). In a one paragraph per curiam opinion the Third Circuit affirmed the enforcement order of the District Court. In rejecting the defense that a summons may not be issued in connection with a fraud investigation, the Third Circuit joined the Second Circuit (In re Magnus, Mabee & Reynard, Inc., 311 F. 2d 12, 16, certiorari denied, 373 U.S. 902), the Fifth Circuit (Siegel v. Tyson, 331 F. 2d 604), the Seventh Circuit (Tillotson v. Boughner, 333 F. 2d 515,

516-517, certiorari denied, 379 U.S. 913), and the Ninth Circuit (Boren v. Tucker, 239 F. 2d 767, 772-773). In refusing to permit the sole shareholder of a corporation to assert his privilege against self-incrimination to prevent the production of corporate books and records the Third Circuit joined with the Second Circuit (Hair Industry, Lt'd v. United States, 340 F. 2d 510, petition for certiorari pending; United States v. Fago, 319 F. 2d 791, certiorari denied, 375 U.S. 906; United States v. Guterma, 272 F. 2d 344) and the Ninth Circuit (Wild v. Brewer, 329 F. 2d 924, certiorari denied, 379 U.S. 914) in following the Supreme Court rule as set forth in Grant v. United States, 227 U.S. 74, 79-80.

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

District Court Decisions

Jurisdiction; Action by Landlord Seeking Collection of Rent From United States for Period During Which Leased Premises Were Padlocked After Seizure by Internal Revenue Service for Nonpayment of Federal Taxes Dismissed for Failure to State Claim Upon Which Relief May Be Granted. Arnold A. Smith, et al. v. United States. (D. Ariz., April 7, 1965). Prior to May, 1964, a landlord leased certain property to the tenant-taxpayer who, at the time of the seizure of the property by the Internal Revenue Service, was in arrears for rental payments. In May, 1964, when Internal Revenue Service agents served a Notice of Levy on the tenant for nonpayment of taxes, they took possession of the premises, seized the tenant's personal property located therein, and padlocked the premises. At the time of the seizure, the landlord advised the agents that the Government would be looked to for payment of rent during the period that the premises were padlocked. Six months subsequent to the seizure, and after the tenant's property had been sold, the padlocks were removed.

The landlord instituted this suit against United States under 28 U.S.C. 1346(a)(2) on the theory that the action taken by the Government created an implied contract to pay the reasonable rental value for possession of the premises, or, in the alternative, that the seizure was a taking of the landlord's property without due process of law.

The Government moved to dismiss the action on the basis that in order to maintain an action based on implied contract, the facts must indicate some understanding between the parties with regard to the rental of or use of the property, and that since the landlord had no right to possession there could be no taking of his property. The Court agreed with the Government and dismissed the action.

Staff: United States Attorney William P. Copple (D. Ariz.); and John O. Jones (Tax Div.).

Tax Levy; In suit Against Maker of Negotiable Promissory Note Who Was Indebted to Taxpayer, Government Was Entitled to Summary Judgment But Court Required Government to Bring Taxpayer and Note Before Court to Have Payment Ordered Evidenced on Note. United States v. E.J. Bowe. (M.D. Fla., February 23, 1965). (CCH 65-1 U.S.T.C. ¶9361). A tax levy had been served upon E.J. Bowe on November 21, 1960, and, on that date, he was indebted to the taxpayer on a

negotiable promissory note in the amount of $20,000. The note was dated April 2, 1956, in the original amount of $50,000 and it was due two years from the date. The tax levy was in the amount of $15,945, and, when the levy was not honored, this suit was instituted against the maker, E. J. Bowe. The taxpayer was not named a party to the suit.

The District Court granted the Government's motion for summary judgment against the maker of the note, subject, however, to the note being brought into the Court for the purpose of having noted thereon the full amount paid by the maker to the Government pursuant to the judgment of the Court. Upon being advised that taxpayer resided within the jurisdiction of the Court, the Court also ordered the Government to bring taxpayer before the Court so that the payment could be evidenced on the back of the note. The Court reasoned that, since the note could be negotiated, in the interest of complete justice, the amount paid by the maker should be so evidenced on the note so that it would constitute a reduction in that amount on the indebtedness due the holder and owner of the note.

Staff: United States Attorney Edward F. Boardman (M.D. Fla.); and Sherin V. Reynolds (Tax Div.).

Federal Tax Liens; Federal Tax Liens Attach to Mortgagor's Interest in Property Even Though, Under State Law, Mortgagee Holds Legal Title, and, in Competition with Prior Mortgage and Later Arising Local Property Taxes, Federal Tax Liens Are Entitled to Satisfaction From Proceeds of Property Which Remain After Setting Aside Amount of Prior Mortgage. United States v. Rahar's Inn, Inc. (D. Mass., April 7, 1965). (CCH 65-1 U.S.T.C. ¶9411). The United States brought this action to foreclose its tax liens outstanding against Rahar's Inn, Inc., to enjoin the defendant, Florence Savings Bank, from proceeding with a non-judicial foreclosure under the power of sale in a mortgage which the Bank held on taxpayer's property, and to secure appointment of a receiver of the subject property.

The only substantive issue to arise here on cross-motions for distribution of the net proceeds of sale of the taxpayer-corporation's assets involved application of the "circular priority" rule. In according the United States priority over local property taxes arising subsequent to the federal tax liens and thus requiring the senior lienor, the mortgagee, to bear the burden of the local taxes, which primed the Bank's claim under state law, the Court adhered precisely to the doctrine of United States v. City of New Britain, 347 U.S. 81, and United States v. Buffalo Savings Bank, 371 U.S. 228. The Court rejected the Bank's argument that, since under Massachusetts law legal title to mortgaged property is in the mortgagee, the taxpayer retained no interest in the subject property to which the federal tax liens could attach. Further, the Court rejected the Bank's claim for insurance premiums, as well as attorney's fees, paid subsequent to filing of the federal tax liens.

A tangential issue arose here also as to an alleged agreement by the Assistant United States Attorney handling this case for the Government to assure full payment of the Bank's claim in return for the Bank's acquiescence in appointment of a receiver. The Court found no evidence of such an agreement and

had no difficulty in discounting its likelihood even, recognizing that the Government's purpose in bringing suit was to assert its priority in a situation where it was readily apparent that liquidation of the taxpayer's assets would not produce sufficient funds for satisfaction of all secured claims thereto.

Staff: United States Attorney W. Arthur Garrity, Jr.; Assistant United States Attorney Murray H. Falk (D. Mass.); and Charlotte P. Faircloth (Tax Div.).

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