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UNITED STATES ATTORNEYS
BULLETIN

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Vol. 13 November 26, 1965 No. 24

IMPORTANT NOTICE

The United States Attorneys will receive shortly the following Departmental Memos:

Memo No. 437 - Criminal Prosecutions Under "Wire Tapping Statute"
Memo No. 438 - The Seat Belt Safety Standard Act - P. L. 88-201
Memo No. 439 - Defense Suppression of Evidence Obtained by Electronic Surveillance
Memo No. 440 - Revision of Policy in Credit Card Cases
Memo No. 441 - Amendment of 18 U.S.C. 35, the "Bomb Hoax" Law - P.L. 89-64

All of these Memos contain important policy information and procedural instructions, and United States Attorneys are requested to read each Memo carefully.

CASELOAD REDUCTION

Based on the figures as of December 31, 1965, a list of those districts which have reduced their pending caseloads during the first six months of fiscal 1966 will be published in the Bulletin.

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Trade Association Charged With Violation of Section 1 of Sherman Act. United States v. Association of American Weighmasters, Inc. (S.D. N.Y.) D.J. File 60-402-2. On November 8, 1965, a civil suit was filed charging the Association of American Weighmasters, Inc. (AAW) with conspiring to fix prices of weighmaster services in violation of Section 1 of the Sherman Act. AAW is a trade association of weighmasters whose members perform services in the various ports of entry located along the Eastern seaboard and for the General Services Administration of the United States.

Weighmasters furnish an essential commercial service performed upon basic commodities. The service consists of weighing, counting or taking samples for analyses of commodities and certifying their weight, quantity or quality. Weighmaster services are performed before delivery of the commodities to the buyer can be effectuated. The principal users of weighmaster services are United States importers and the United States Government.

The complaint alleges that since at least 1953 AAW has published a price list for weighmaster services to which its members have agreed to adhere. The effect of the conspiracy has been to eliminate price competition among the members of AAW and to deprive purchasers of weighmaster services of the benefit of free and open competition.

The complaint seeks to have AAW perpetually enjoined from carrying on any activities to fix or promulgate prices for weighmaster services. It also prays that the court issue such orders with respect to membership in AAW as are necessary to assure that the membership of AAW abides by any final judgment entered by the court.

Staff: John J. Galgay, John D. Swartz, Bertram M. Kantor and Robert D. Canty (Antitrust Division)

Coal Companies Charged With Violation of Sections 1 and 2 of Sherman Act. United States v. Anthracite Export Association, et al. (M.D. Pa.) D.J. File 60-187-136. On November 10, 1965, a civil action was filed charging six producers of Pennsylvania anthracite, their export trade association and two affiliated wholesalers with unlawfully fixing prices and allocating the supply of $90,000,000 worth of anthracite sold to the United States Army for use at its European bases.

The complaint alleged that the six anthracite producers, Glen Alden Corporation, Reading Anthracite Company, Lehigh Valley Anthracite, Inc., Jeddo-Highland Coal Co., Susquehanna Coal Company and Lehigh Navigation Dodson Company, combined through the Anthracite Export Association and the two wholesalers, Foreston Coal Company and Foreston Coal Export Corp., to violate Sections 1 and 2 of the Sherman Act.

Prior to November 16, 1960, the United States military installations in

Europe bought European coal. However, on that date a "Presidential Balance of Payments Directive" was issued and in 1961 a "Buy America" preference policy was put into effect resulting in the limitation of Army coal procurement solely to United States sources. Since that time, virtually all of the coal for the United States Army in Europe has been supplied by the defendants through a Dutch importer who was named as co-conspirator.

The complaint alleges that since 1961, the defendant producers used the export association to fix prices of anthracite and to allocate the Army business among themselves. The complaint also alleges: that the defendant producers further eliminated competition by agreeing to offer anthracite under this program exclusively through the Foreston companies; that defendants hindered rival domestic exporters from quoting on and purchasing anthracite produced by non-members of the export association, by exerting pressures and invoking continuing sales agency and sales agreements; and that defendants and the Dutch co-conspirator resorted to bidding tactics, including the use of quantity discounts, designed to prevent other producers, exporters and importers from obtaining some of the Army business.

The complaint seeks an injunction against the alleged price-fixing, allocation of Army business, joint bidding and other activities, which have deprived the United States of the right to buy anthracite for the Army at free and competitive prices, and prevented other producers and exporters from competing freely in this substantial Army business.

Staff: H. Robert Halper and David J. Leonard (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

CLAIMS

Personal Money Judgment Against Corporate Stockholders Who Ignore Priority of United States by Disbursing Bankrupt Corporation's Assets to Private Creditors Is Authorized Pursuant to 31 U.S.C. 191 and 192. Lakeshore Apartments, Inc. v. United States (C.A. 9, No. 19,555, September 29, 1965), D.J. File 130-82-1341. The United States commenced this action for a money judgment against the two stockholders of an apartment corporation whose note and mortgage were assigned to the Commissioner of the Federal Housing Administration after default on the note. After further default following the assignment, the United States filed a foreclosure complaint and a motion seeking the appointment of a receiver for the corporation. Rather than grant the motion for a receiver, the district court continued the matter upon the stockholders' stipulation that the corporation would not disburse any assets except in the ordinary course of business. However, when a receiver was later appointed, he discovered that defendants had made preferential payments to certain large creditors of the corporation. Defendants were adjudged guilty of contempt and were ordered to and did purge themselves by paying a sum equivalent to the preferential disbursements to the receiver. In addition, a money judgment was entered in favor of the United States in an amount equivalent to the sum paid to the receiver.

The Ninth Circuit affirmed this money judgment because the defendants "were clearly liable under the provisions of 31 U.S.C. § 191, the statute creating a priority in favor of debts due the United States, and 31 U.S.C. § 192, the statute which imposes liability for failing to heed the priority."

Staff: United States Attorney William N. Goodwin and Assistant United States Attorney Robert C. Williams (W.D. Wash.).

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Section 203 of LMRDA Interpreted to Require Reporting of All Labor Activities Engaged in by Attorney in Annual Report. Douglas v. Wirtz (C.A. 4, No. 9870, October 8, 1965), D.J. File 156-54M-9. The LMRDA requires every person who, pursuant to any agreement or arrangement with an employer, undertakes activities to persuade employees to exercise or not to exercise or as to the manner of exercising the right to organize and bargain collectively, must file a report within 30 days of the agreement setting out its terms. Section 203(b), 29 U.S.C. 433(b). In addition, he must file an annual report containing a statement of "receipts of any kind from employers on account of labor relations advice or services" and of disbursements in connection with such services and the purpose thereof, in any year in which payments were made as a result of the agreement or arrangement. Section 203(c) of the LMRDA, 29 U.S.C. 433(c),

however, provides that nothing in the section shall be construed to require anyone to file a report covering his services by reason of his giving or agreeing to give advice to an employer.

An attorney specializing in labor law, undertook certain services in 1960 and 1961 which he conceded to be reportable under section 203(b). As to the employers involved in those services he filed the 30 day and annual reports which covered all income and expenses involved. During that period, however, and in 1962, when the last payments from the concededly reportable activities were received, he undertook other labor services, which standing alone, would not be reportable. The attorney contended that, as to these services, no disclosure of receipts and disbursements was required by the LMRDA, since they were of the type referred to in section 203(c). We argued that once the duty to report was triggered by the first reportable agreement or arrangement, all labor services had to be reported, and that section 203(c) merely made clear that an attorney or labor advisor who confined himself to the activities specified therein need not report. The district court dismissed the Government's complaint seeking an injunction requiring the attorney to report all of his labor activities for the years in question.

The Court of Appeals, reversed holding that the LMRDA compels the reporting of all income and expenditures in connection with labor relations advice and services if the attorney has, within the reporting period, either acted or received payment as a "persuader" under section 203(b). The Court found persuasive the legislative history of the reporting provision in question; noted that the section 203(b) activities would be "extracurricular" for a legal advisor; and stated that the name of a client is normally not shielded by the attorney-client privilege.

Staff: Jacob I. Karro and Nathan Dodell, Department of Labor.

FEDERAL TORT CLAIMS ACT

District Court's Findings Held Consistent With Pretrial Stipulation of Parties Despite District Court's Rejection of Parts of Stipulation; District Court Permitted to Take Income Taxes Into Account in Computing Damages. United States v. Sommers, et al. (C.A. 10, Sept. 30, 1965). These actions arose out of a mid-air collision between a United Airlines passenger airplane and an Air Force jet fighter over Las Vegas, Nevada, in 1958. The actions were brought by the survivors of the co-pilot and engineer of the United airplane, who asserted both negligence of the pilot of the fighter airplane, and negligence of other Government agencies. Our principal defense was contributory negligence in failing to keep a watch for other aircraft. The record on liability consisted of a pre-trial stipulation and order of the parties, together with the evidence taken in United Airlines v. Wiener, 335 F. 2d 379 (C.A. 9). The district court held in favor of the plaintiffs, finding negligence on the part of Government agencies, including the pilot of the fighter airplane in failing to see and avoid the United Airlines airplane, but found no negligence on the part of the United crew. In so doing, the district court expressly rejected three paragraphs agreed of the pre-trial stipulation.

The Government appealed primarily on the ground that the district court erred in rejecting the stipulated facts, and that, upon the facts as stipulated, and the finding of negligence on the part of the Government pilot, the district court must necessarily have found negligence on the part of the United crew. Plaintiffs appealed on the inadequacy of damages, particularly on the district court's computation of damages on the basis of income after taxes rather than upon gross income.

The Court of Appeals affirmed the district court in every respect. While recognizing that a trial court may not disregard the fact stipulated to by the parties, the Court ruled that the district court findings here were not inconsistent with the general statements of the stipulation and were not so considered during the trial. In so doing the Court ignored the fact that the district court had expressly rejected certain parts of the stipulation.

On the question of the proper standard of determining damages, the Court ruled that the income available to survivors would be that after income taxes had been withheld, and affirmed the district court's holding in that regard. The Court indicated generally that if the district court's award of damages was reasonable, it would be affirmed regardless of the specific use of income after taxes or income before taxes.

Staff: David L. Rose (Civil Division)

SOCIAL SECURITY ACT

Secretary Not Required to Make Job Availability Findings Where, as Here, Claimant Is Found to Be Capable of Engaging in Former Work. Letha E. Carden v. John W. Gardner, etc. (C.A. 6, November 1, 1965), D.J. File. 137-70-85. The Sixth Circuit here affirmed the Secretary's denial of disability benefits. The Court held, with respect to claimant's argument that the Secretary had failed to make job availability findings, that "where the Secretary has found from the evidence that claimant is able to engage in a former trade or occupation, such a determination 'precludes the necessity of an administrative showing of gainful work which appellant was capable of doing and the availability of any such work.'" The Court then stated that it was evident from the record that the Secretary had found claimant capable of engaging in her usual occupation and that such finding was supported by the evidence.

Staff: Lawrence R. Schneider (Civil Division)

WARSAW CONVENTION

Airline's Failure to Give Timely Warning to Passengers That Warsaw Convention Limited Airline's Liability in Event of Accident Precluded Airline From Asserting That Limitation of Liability. John S. Warren, et al. v. The Flying Tiger Line, Inc. (C.A. 9, No. 19572, October 25, 1965), D.J. File 88-11-42. The Ninth Circuit reversed the judgment of the district court and held that Flying Tiger Line, Inc., could not avail itself of the $8,300 limitation of

liability provisions of the Warsaw Convention in this suit by dependents and survivors of some one hundred servicemen killed when a Flying Tiger aircraft, under charter to the Federal Government, crashed into the Pacific while transporting troops to Viet Nam, since the carrier failed to give notice to the passengers of the Convention's limitation on liability in sufficient time to allow them to obtain other protection, i.e., flight insurance. Here, notice was given by the carrier as the soldiers embarked on the plane. The Ninth Circuit had invited our participation as amicus, and adopted the position we urged in our brief.

Staff: Richard S. Salzman (Civil Division)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

Generation of Sonic Booms by Air Force Aircraft on Supersonic Training Missions Held to Be Within Discretionary Function Exception, 28 U.S.C. 2680(a). Kathy Gay Schwartz v. United States (D. N.D., Civil No. 658, Sept. 20, 1965), D.J. File 157-56-31. Plaintiff brought suit under the Federal Tort Claims Act for property damage to a grain storage structure in the amount of $33,071, allegedly caused by sonic booms. The complaint set forth as theories of recovery, negligence, trespass, and res ipsa loquitur. The Government moved for summary judgment based on the discretionary function exception, 28 U.S.C. 2680(a). The motion was supported by affidavits of the Air Force Chief of Staff, the Commander of the Air Defense Command, the Commander of the Fifth Fighter Intercept Squadron, and each of the pilots in question to the effect that "the aircraft involved, on the day in question, were operated in conformity with all existing regulations." The Court granted our motion.

Staff: United States Attorney John O. Garaas (D. N.D.);
Michael R. Wherry (Civil Division).

Motion for Summary Judgment by United States Denied in Tort Action Where Post Office Failed to Require Apartment House to Secure Master Door of Multiple Mailboxes With Lock as Required by Regulations and Plaintiff Was Injured When She Struck Open Master Door in Unlit Hall. Jones v. United States (D. Del., Civil No. 2408, November 8, 1965). D.J. File 157-15-42. Plaintiff injured her eye when she walked into the master door of her apartment house mail receptacle located in an unlit hallway. The door was ajar because, contrary to postal regulations a master lock to keep it closed had not been installed, even though the local post office was on notice of the deficiency. Plaintiff sued the United States in tort on two theories: (1) the post office regulations requiring master locks on apartment house multiple mail receptacles were promulgated to protect the general public from injury and it was negligence per se to violate them; and (2) the post office could have foreseen that the light near the mail box might burn out; that without a lock the master door might fall open; and that in the dark someone might injure himself on the door. The Government's

motion for summary judgment was denied by the District Court. While ruling that the cited postal regulations created no duty to the general public, the Court held that the question of foreseeability would have to be determined after a trial on the merits.

Staff: United States Attorney Alexander Greenfeld and Assistant United States Attorney Stanley C. Lowicki (D. Del.).

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

OBSTRUCTION OF JUSTICE

Possible Obstruction of Justice Resulting From Early Release of "Jencks" Statements. United States v. Louis M. Ray (W.D. La.). During the trial of this case, distribution of "Jencks" statements to the defense on the day preceding the testimony of Government witnesses resulted in a possible obstruction of justice.

On September 1, 1965, at the instigation of United States District Judge Edwin F. Hunter, Jr., of the Western District of Louisiana, a pre-trial conference was held. The stipulation entered into as a result of this conference included a provision that the Government would furnish Jencks statements to the defense 24 hours prior to the testimony of Government witnesses.

During presentation of the Government's case, Jencks statements were furnished to defense counsel one day in advance of the testimony of Government witnesses. One of the Government's witnesses, a housewife and mother, telephoned Deputy United States Marshal Russell Jordan on the night before she was to testify but after her Jencks statement had been furnished to the defense, and stated in a telephone conversation that the defendant had threatened to expose her prior intimate relationship with him unless she testified in a manner contrary to her prior statement to the FBI. This information was brought to the attention of Judge Hunter.

Prior to trial, the following morning, counsel for both sides, the defendant, and the court reporter met in the Judge's chambers, and defendant, on advice of counsel, admitted that he had called the witness, but stated that the purpose of the call was social and had nothing to do with the witness' testimony. Judge Hunter then warned the defendant and his counsel that the defendant was not to contact any of the Government's witnesses for any reason. However, immediately after this meeting James Sparks, one of the defense lawyers, returned to Judge Hunter's chambers and advised him that the defendant had in fact admitted threatening the witness.

It seems clear that this obstruction, or attempted obstruction, would not have occurred if access to this particular witness' prior statement had not been granted before she was to testify. It also appears that exposing the defendant's first attempt may have deterred him from trying to influence the testimony of other witnesses, many of whom were former employees and business associates.

It is suggested that in the future when the Government agrees to furnish the defense with Jencks statements in advance, the Court be requested to instruct the defendant and his attorneys not to contact Government witnesses once they have received the prior statements of such witnesses. Disobedience of this instruction would constitute contempt. If objection is made to this procedure, the defense should not be given witnesses' prior statements until after the witnesses have testified on direct examination.

WAGERING

Accepting Wager, Either as Principal or Agent, and Failing to Pay Occupational Tax Is One Crime; Failure to Register and Failure to File Returns in Violation of §7203 Are Separate Crimes. Driscoll, et al. v. United States C.A. 1, Oct. 29, 1965). D.J. File 160-36-372. Each of the appellants was found guilty, respectively, on a count which charged that he

> did engage in the business of accepting wagers, as defined in 26 U.S.C. 4421 and did engage in receiving wagers for or on behalf of a person liable for the tax on wagers, imposed by 26 U.S.C. 4401, having wilfully failed . . . to pay the special occupational tax as required by 26 U.S.C. 4411 . . . in violation of 26 U.S.C. 7203.

Appellants urged that one who accepts a wager as a principal in the occupation of gambling without having paid the occupational tax is guilty of a crime different from that of one who, acting as an agent, accepted a wager for a principal, and that accordingly, the respective count upon which they were all convicted, was duplicitous. The Court, in rejecting this argument held that the respective count upon which each appellant was convicted charged only that he engaged in accepting wagers without buying the stamp required by law and that in whichever capacity, whether as principal or agent, he accepted the wager, his crime was the same. The Court in so holding referred to Rule 7(c), F.R. Crim. P., wherein it is stated that it may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. This decision is significant in view of the opposite holding in United States v. Pepe, 198 F. Supp. 226 (D.C. Del., 1961) affirmed, per curiam, 339 F. 2d 264 (C.A. 3, 1964).

One of the appellants was charged additionally in one count with wilfully failing to register and to file returns as required by 26 U.S.C. 4412 and regulations promulgated thereunder in violation of 26 U.S.C. 7203. The Court held that the count charged two or more separate crimes, reasoning that the failure to register would be a violation of §7203, and even if one registered, the failure to file the first or any subsequent required return would be a violation of § 7203.

Each defendant was found not guilty of a count charging him with conspiring to violate §7203. In a concurring opinion Chief Judge Aldrich stated that he "deplore[d] the recent tendency of the Government in this and other districts to employ the conspiracy device for prosecuting what, however one may look at it, is only a misdemeanor." He opined that, "If the Government brings needless conspiracy counts simply as adjuncts to substantive counts, hoping to gain some procedural advantage some day it is going to find the pitcher has gone too often to the well." In this regard it should be noted that the rule is well established that when there is evidence of common purpose that makes certain declarations of one admissible against the other it is not necessary for the purpose of admissibility that a conspiracy be alleged. See United States v. Smith, 343 F. 2d 847 (C.A. 6, 1965), United States v. Annunziato, 293 F. 2d 373 (C.A. 2, 1961), United States v. Pugliese, 153 F. 2d 497 (C.A. 2, 1945).

Staff: United States Attorney W. Arthur Garrity; Assistant United States Attorneys Edward F. Harrington and William B. Duffy, Sr. (D.Mass.).

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Appellant's Grand Jury Minutes Held Admissible Against All Defendants Where Jury Found Appellant's Appearance Before Grand Jury to Be In Furtherance of Conspiracy. United States v. Brill, et al., 350 F. 2d 171 (C.A. 2, August 2, 1965). D.J. File No. 156-51-605. Appellants Hyman, Cotliar, Brill and Scalza were convicted of conspiring to violate 29 U.S.C. 501(c), in that they embezzled, stole and converted to their own use and the use of others funds of three labor organizations, Local 229, United Textile Workers of America, Local 77, New York City District Council, and Local 819, International Brotherhood of Teamsters. The evidence established that appellants and other conspirators stole funds from the Union treasuries by means of false vouchers and fictitious salary payments to persons who performed no services for the unions. These stolen funds were diverted to the use of the appellants and others.

On appeal, the following significant issues were raised:

1. Was it proper to admit the appellant Scalza's grand jury minutes with the instruction that the minutes might be considered against the other defendants if the jury found them to be in furtherance of the conspiracy.

2. Did the prosecution have the right to elicit, on direct examination, that its witness had pleaded the Fifth Amendment before the grand jury and was testifying under a grant of immunity.

3. Does 501(c), the general statute against embezzlement from unions, prohibit the use of a duly authorized union expense account for non-union purposes.

Concerning the grand jury minutes, the Court suggested that admissibility might be based upon a continuation of the conspiracy. Alternatively, the Court held that since Scalza took the stand in his own defense, and subjected himself to cross-examination, any disadvantage to the appellants was cured.

The Court upheld the right of the prosecution to elicit that its witness had pleaded the 5th Amendment and was testifying under a grant of immunity. It reasoned that it was standard procedure for appellants on cross-examination to show the advantage the witness received for his testimony and that, therefore, the Government was not required to withhold this information so that appellants could exploit it with increased effectiveness on cross-examination. The Court placed heavy reliance on United States v. Freeman, 302 F. 2d 347 (C.A. 2, 1962), cert. denied, 375 U.S. 958 (1963) and distinguished Grunewald v. United States, 353 U.S. 391 (1956), United States v. Gross, 276 F. 2d 816 (C.A. 2, 1960), cert. denied, 363 U.S. 831, and United States v. Tomaiolo, 249 F. 2d 683 (C.A. 2, 1957).

The evidence established that Scalza and a main witness, Maurice O'Connor, both officials of Local 819, were using their authorized union expense accounts to pay others for the purchase of the membership of Local 77 which was merged with Local 819 as a result of this purchase. Scalza's conviction was affirmed. The Court stated, "What is prohibited [by Section 501(c)] is the charging on

the union books of false and fictitious items under the guise of legitimate salary or expense accounts."

Petitions for writs of certiorari have been filed by Scalza and Hyman.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Gerald H. Abrams and John E. Sprizzo (S.D. N.Y.).

BANKRUPTCY

Responsibilities and Procedures; Bankruptcy Frauds and Other Crimes; Referrals. On October 26, 1965, representatives of the Criminal Division participated in the 1965 Conference of the National Association of Referees in Bankruptcy held at Detroit, Michigan. A very lively topic of discussion concerned the responsibilities and procedures under Section 3057 of Title 18, United States Code. (See pages 61 and 62, Title 2, United States Attorneys Manual.) It was our intention to highlight the Department's awareness and emphasis on bankruptcy frauds and other crimes and to seek timely and informative referrals. In line with this purpose and to facilitate coordination we suggested that a carbon copy of the referral letter from the referee to the United States Attorney (or FBI) be directed to the Criminal Division. This will permit the Division to follow the case from its inception and to be in a better position to assist United States Attorneys in the development and evaluation of these cases. We are informed that the Department's discussion will be published in the Referee's Journal in the near future.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Divorced Wife Competent to Testify Against Former Alien Husband in Deportation Proceedings. Konstantinos Volianitis v. INS (CA 9, No. 19958, November 5, 1965) D.J. File 39-12-754.

Petitioner, a Greek native and national, brought this action under 8 U.S.C. 1105a to review an order for his deportation. He first entered the United States in 1952 as an alien seaman and after overstaying his authorized admission was permitted in 1956 to depart from the United States voluntarily in lieu of deportation. Prior to his departure, he married a United States citizen and upon the basis of this marriage obtained a nonquota immigrant visa and was in 1958 admitted for permanent residence. In 1961 he divorced his United States citizen wife.

Deportation proceedings were brought against petitioner in 1964 upon the basis that his immigrant visa was invalid because his marriage was fraudulent and was entered into to evade the immigration laws. He testified in the deportation hearing and his testimony if not contradicted would have established a bona fide marital relationship. The only substantial evidence against him was the testimony of his former wife. Over petitioner's objection, a Special Inquiry Officer and the Board of Immigration Appeals accepted and credited the testimony of his wife that the marriage was sham and entered into solely to enable petitioner to obtain a nonquota immigrant visa illegally.

Petitioner asked that the deportation order be set aside for the reason that his divorced wife was incompetent to testify against him in a deportation hearing under the ruling in Cahan v. Carr, 47 F.2d 604 (C.A. 9, 1931). Respondent, the Immigration and Naturalization Service, contended that the case was controlled by Lutwak v. U. S., 344 U.S. 604 wherein it was held in a criminal prosecution that a wife is not incompetent to testify against her husband if a prima facie showing has been made that the marriage relationship is sham and without substance. The Court found both cases inapposite and decided the case upon the ruling in Pereira v. U. S., 347 U.S. 1. The Pereira case held that divorce removes the bar of incompetency of a wife but does not terminate the privilege for confidential communications between the spouses during existence of the marital relationship. Since most of the wife's testimony related to utterances before the marriage and after the divorce her testimony was found to be admissible, substantial and to support the deportation order. The Court went on to say that, under the Lutwak decision utterances of the petitioner during the existence of the marital relationship may have been admissible. The deportation order was affirmed.

Staff: United States Attorney Manuel L. Real; Assistant United States Attorneys Donald A. Fareed and Jacqueline L. Weiss, (S.D. Cal.)

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950, 50 U.S.C. 786; Registration as Member of Communist-action Organization (the Communist Party), by Individual Members. Albertson and Proctor v. Subversive Activities Control Board. (Supreme Court No. 3, D.J. File 146-7-51-1552.) The Communist Party failed to register with the Attorney General as required by the order of the Subversive Activities Control Board, sustained in Communist Party, U.S.A. v. Subversive Activities Control Board, 367 U.S. 1. Thereupon, under Section 8(a) of the Subversive Activities Control Act of 1950, it became the duty of each member of the Party to register. If the member fails to do so, the Attorney General, under Section 13(a) may petition the Board for an order requiring the member to register. Accordingly, the Attorney General petitioned the Board for orders requiring Albertson and Proctor to register as members of the Party. After evidenciary hearings (in separate proceedings) the Board determined Albertson and Proctor to be members of the Party and ordered them to register. Upon review, the Court of Appeals for the District of Columbia Circuit affirmed the orders, 332 F. 2d 317. Certiorari was granted by the Supreme Court. On November 15, 1965 the Supreme Court (8 to 0) handed down its decision reversing the Court of Appeals and setting aside the Board's orders. The Court disagreed with the Court of Appeals' view that the claim of Fifth Amendment privilege was premature. The Court pointed out that, unlike the situation in the original Party case where the privilege was asserted on behalf of unnamed officers, here the contingency upon which the members' duty to register arises had already matured; i.e., the Party having failed to register, the statutory requirement as to the member had become effective. They asserted their privilege in their answer in the Board proceedings and in the proceedings in the Court of Appeals, and in both proceedings their claim had been rejected by the Attorney General. Furthermore, the Court pointed out that specific orders requiring registration have been issued, and, under regulations promulgated under the statute, petitioners are required to file the registration form and the registration statement prescribed by the Attorney General. Under Section 15(a)2 of the Act each day of failure to register constitutes a separate offense punishable by a fine up to $10,000 or imprisonment up to five years or both. The Court said that petitioners must either comply without decision on the merits of their privilege claims, or risk onerous penalties.

Under the statute and the regulations a member of a Communist-action organization who has been found to be such on the basis of an administrative hearing before the Board is required to register with the Attorney General as such a member. The registration form is to be accompanied by a separate form which is the Registration Statement. It was the Government's contention before the Supreme Court that the mere filing of the registration form, which at most requires the bare admission of Communist Party membership, would not be incriminatory. And as any of the questions on the registration statement would be incriminatory the registrant should be required to file the form and invoke the Fifth Amendment on the form. The basis of this argument with respect to the registration form was that Section 4(f) of the Act prohibits the fact of the registration form being used in evidence in any criminal case, and the fact

that the Attorney General had already proceeded against the member and produced evidence before the Board of his Communist Party membership demonstrated conclusively that the mere registration could not possibly provide a lead with respect to such membership, undeniably taking the case out of the rule of Counselman v. Hitchcock, 142 U.S. 547.

The Court however refused to accept this contention and concluded that the "judgment as to whether a disclosure would be 'incriminatory' has never been made dependent on an assessment of the information possessed by the Government at the time of interrogation; the protection of the privilege would be seriously impaired if the right to invoke it was dependent on such an assessment, with all its uncertainties. The threat to the privilege is no less present where it is proposed that this assessment be made in order to remedy a shortcoming in a statutory grant of immunity."

Staff: The case was argued by Kevin T. Maroney. With him on the brief were George B. Searls and Lee B. Anderson, Internal Security Division.

Subversive Activities Control Act of 1950; Registration of Communist-action Organizations. United States v. Communist Party, United States of America (District of Columbia, D.J. File No. 146-7-51-566.) A twelve-count indictment against the Communist Party charging that it failed to register and file a registration statement in violation of 50 U.S.C. 786 and 794 was returned on December 1, 1961. (United States Attorneys Bulletin, Volume 9, No. 25, p. 731) The conviction in this case (United States Attorneys Bulletin, Volume 10, No. 26, p. 720) was reversed on December 17, 1963 with instructions to grant a retrial if the Government requested.

On February 25, 1965 a new indictment containing an additional twelve counts was returned. (United States Attorneys Bulletin, Volume 13, No. 15, p. 100). Prior to the consolidated trial and retrial the Government elected to proceed on the 12th count of the December 1, 1961 indictment rather than the 12th count of the later indictment. Both of these counts charged the Communist Party with failure to file a registration statement. On November 19, 1965, the jury returned a verdict of guilty on 23 counts and the Court fined the Communist Party, USA the sum of $230,000.

Staff: Former United States Attorney David C. Acheson and Assistant United States Attorney Joseph Lowther (D. D.C.); James A. Cronin, Jr., and Earl Kaplan (Internal Security Division)

Unlawful Exportation of Implements of War. U.S. v. Gregory R. Board, et al. (W.D. N.Y., D.J. File 146-12-3316.) On October 8, 1965, a four-count indictment was returned by the grand jury charging six defendants with violating and conspiring to violate 22 U.S.C. 1934 and the Munitions Control Regulations issued thereunder (22 CFR 121, et seq.) in connection with the exportation to Portugal of seven B-26 surplus military aircraft without first having obtained the required license from the State Department.

The conspiracy count charged that it was part of the conspiracy to employ various and devious means, such as contracts and flights by way of Canada, to make it appear the destination of the planes was Canada (and thus not subject to license) when in fact the destination was Portugal. It was also charged in the conspiracy that an order for twenty B-26 type aircraft was placed with the defendant Board of Tucson, Arizona, and that a letter of credit (of almost $700,000) was filed with a bank in Arizona. Two counts of the indictment charged actual exportation of B-26 aircraft from Rochester, New York and the fourth count charged the defendants Board and Aero Associates with being engaged in the business of exporting arms, ammunition, and implements of war without having registered with the Secretary of State as required by the regulations.

Staff: United States Attorney John T. Curtin (W.D. N.Y.) Joseph T. Eddins (Internal Security Division)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Condemnation: Appropriation Act and 40 U.S.C. 257 Authorized Takings. Perati v. United States (C.A. 9, No. 19355, Nov. 8, 1965, D.J. File 33-5-2225). Relying on an act which appropriated funds for the Department of the Interior, and 40 U.S.C. 257 which provides that whenever a Government officer is "authorized to procure real estate" he may acquire it by condemnation, the United States condemned privately owned land within Yosemite National Park. The Appropriation Act provided funds for the acquisition of such lands within national parks, but did not specify Yosemite by name. The district court struck the landowner's answer which challenged the authority for the taking. Just compensation was then determined.

On the landowner's appeal, the Court of Appeals affirmed, citing United States v. Kennedy, 278 F. 2d 121 (C.A. 9, 1960), as indistinguishable.

Staff: Assistant United States Attorney A. Lawrence Burbank (N.D. Cal.) and Raymond N. Zagone (Lands Division).

Condemnation: Bankruptcy; Jurisdiction; "Exclusive" Jurisdiction of Bankruptcy Court Does Not Preclude Federal Condemnation of Bankrupt's Property in Another Court. United States v. New York, New Haven and Hartford Railroad Company (C.A. 1, No. 6451, July 15, 1965) D.J. File 33-22-878. The district court in Massachusetts dismissed a suit to condemn land in Massachusetts because the owner of the property was undergoing reorganization in the district court for Connecticut which was, under 11 U.S.C. 205, vested with exclusive jurisdiction over the bankrupt and his property wherever located.

On appeal by the United States, the Court of Appeals reversed on the grounds that, since the bankruptcy court could not "suspend or impede exercise of the power of eminent domain," the jurisdiction of the district court, where the property was located and the suit was filed under 28 U.S.C. 1403, must prevail.

Staff: Roger P. Marquis and Edmund B. Clark (Lands Division)

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TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

CRIMINAL TAX MATTERS

Appellate Decisions

Evidence, Sufficiency of in Case Where Wilful Attempted Evasion Is Established by Proof of Unreporting of Large Expense Checks; Adverse Newspaper Publicity, Effect of. Fred B. Black, Jr. v. United States (C.A. D.C.), November 10, 1965. Appellant's conviction for the attempted evasion of his income taxes for the years 1956 through 1958 was affirmed. The evidence showed that appellant was an influential Washington contact man for a number of clients; that during the prosecution years he had received some $140,000 in income items that were not reported; that with a single exception the reported items were always those for which a Form 1099 information return had been filed with the Director of Internal Revenue by the payor, and the unreported items were always those for which no such information return had been filed; that on occasion appellant asked the payor not to file such a return; that there was no showing by appellant either to the payors or to the Treasury agents (or, indeed, at the trial) as to the disposition of the $140,000 in "expense" payments received by appellant, although he did claim on his returns, and was allowed, some expense items; and that appellant's tax returns were prepared by his accountant, assisted by his attorney and, to some extent, by appellant himself. The evidence further showed that there were many items of income received by appellant of which the accountant was wholly unaware; that when the 1956 return was prepared appellant was personally present and actively participated, but did not advise the accountant of any of the unreported income items; that after the 1957 return was filed the accountant, being unsatisfied with the manner in which the income figures were accumulated, began to maintain books for appellant; that although appellant's attorney may have had more knowledge of appellant's income than the accountant had the attorney, for some unexplained reason, did not think it necessary to report the receipts that were not reflected on the 1099 information return forms; but that he was not a tax attorney and denied giving appellant legal advice about his income tax matters. Appellant argued that the Government had failed to prove that the items in question really reflected taxable gains to the appellant, i.e., that they had not in fact been paid out by him for expenses; and, second, that there was no criminal intent in any event because appellant relied in good faith upon his accountant and attorney to prepare proper returns.

The Court held that the burden of proof of showing that he had deductible expenses in excess of those claimed on the returns was upon appellant, citing a long line of cases from a number of circuits, primarily United States v. Bender, 218 F. 2d 869, 871 (C.A. 7), certiorari denied, 349 U.S. 920, and that he had utterly failed to sustain it. The Court found it reasonable to infer that appellant had placed something less than total reliance upon his accountant and attorney and was aware of the omission of

substantial receipts from the tax returns, and that the accountant lacked adequate information to prepare proper returns because checks frequently went directly to appellant, bypassing the accountant's office.

On the subject of adverse newspaper publicity, the Court found that it was not sufficiently prejudicial to call for a new trial. It pointed out that the trial judge had frequently cautioned the jury not to read such articles; that the defense did not press a suggestion that the jurors be interrogated about the article alleged to be most prejudicial; that the defense had never requested that the jury be sequestered and when this step was taken to insulate them from further exposure to the news media, the defense objected.

Staff: Joseph M. Howard, John P. Burke and K. William O'Connor (Tax Division)

Cross-Examination, Deprivation of Right of. Wheeler v. United States (C.A. 1), October 26, 1965. Appellant was convicted on four counts of having wilfully attempted to evade his income taxes. The case involved mainly the deduction of substantial fictitious amounts as expenses of a wholly-owned corporation. The Government's principal witness was one White, appellant's attorney, whose testimony alone would have been sufficient to result in a conviction. White was asked on cross-examination whether he had claimed or would claim an informant's award in connection with the case, and the Government's objection was sustained. Appellant's attorney offered to prove that the answer would be in the affirmative, but the question was still ruled objectionable. On appeal, appellant argued that this ruling improperly infringed his right of cross-examination. The Court agreed and reversed the conviction, relying mainly upon Alford v. United States, 282 U.S. 687, and District of Columbia v. Clawans, 300 U.S. 617, 632. As the Court pointed out, if White had testified that he had a financial stake in the outcome of the case the effect of his testimony would be weakened:

> One of the useful functions of cross-examination is to assist the fact-finder in appraising the credibility of a witness and a witness's financial stake in a particular outcome is relevant to the issue of his credibility. * * * This rule [trial court's discretion] limiting the extent of a cross-examination as to a witness's credibility may be invoked to sustain a trial court's decision restricting cross-examination only after a party has had a chance to exercise his right to cross-examine within the areas where the witness's interest is suspect. Here the trial court prevented any cross-examination relative to White's financial interest in the outcome of the case. * * *

Staff: United States Attorney W. Arthur Garrity, Jr.; Assistant United States Attorneys William J. Koen and Melvin B. Miller (D. Mass.)

CIVIL TAX MATTERS

District Court Decisions

Exemptions; Under Montana Law, Filing of Homestead Declaration Creates Merely Privilege or Exemption Rather Than Property Interest and, Therefore, Tax Liens Filed Prior to Transfer of Taxpayer's Interest in Such Property to His Wife Still Attach to Property. Frances G. Aronow v. United States. (D. Mont., Sept. 30, 1965). (CCH 65-2 U.S.T.C. ¶9692). Taxpayer's wife instituted this suit to quiet title to certain real property which she and the taxpayer had purchased in 1957 taking title as joint tenants. Taxpayer and his wife later executed and filed a declaration of homestead at which time one federal tax assessment had been made against taxpayer and notice of lien had been filed. Later, additional taxes were assessed against taxpayer and notices of lien were filed. Taxpayer than conveyed all of his interest in the property to his wife, and she instituted this action seeking a decree adjudging that the United States has no encumbrance against the property and quieting title against the United States.

The Court, in refusing to extinguish the Government's tax liens, pointed out that their joint declaration of homestead merely created a privilege or exemption and that no property right was given the taxpayer's wife in her husband's joint tenancy interest. Accordingly, the Court held that since the tax liens were filed before the conveyance from taxpayer to his wife occurred these tax liens remain an encumbrance on the property interest conveyed by the husband.

Staff: United States Attorney Moody Brickett and
Assistant United States Attorney Donald A. Douglas
(D. Mont.).

Federal Tax Liens; Tax Liens Attach to Cash Surrender Value of Insurance Policies and Can Be Enforced Against Death Proceeds Received by Beneficiary to Extent of Cash Surrender Value When Senior Liens Have Been Extinguished. United States v. Lillian Wintner, et al. (N.D. Ohio, Sept. 4, 1964). (CCH 65-2 U.S.T.C. ¶9642). Taxpayer had eight insurance policies with substantial cash surrender values, and all of the policies were assigned to a bank as security for a loan. The date of the loan and assignment predated both the date that $26,002.09 of federal tax liens arose and the date notice thereof was filed. On the date that taxpayer died, the cash surrender value of the eight assigned policies was $34,503.85. The total indebtedness due the bank was $34,000, only $503.85 less than the cash surrender value of the policies.

The bank had the right to apply both the cash value and the death benefit in satisfaction of its loan, and the total maturity value of the eight policies was $87,500. Shortly after taxpayer's death, the bank at its option applied $34,000 from two of the eight policies, with a total death benefit of $40,000 but a cash surrender value of $16,229.20, in satisfaction of its loan and released its lien with respect to the six policies as well as the $6,000 of excess death benefits payable from the aforesaid two policies.

The United States then initiated a lien foreclosure action against the beneficiary, taxpayer's widow, and the bank, and asserted that the Court should apply the doctrine of marshaling, thereby requiring the bank to satisfy its claim out of the death benefits in excess of the cash surrender value and allowing the junior creditor, the United States, to satisfy its claim from the cash surrender value of the policies. The Court applied the doctrine of marshaling, 200 F. Supp. 157, thereby allowing the United States to have its claim paid in full. The Court of Appeals for the Sixth Circuit sustained the trial court (CCH 63-1 U.S.T.C. ¶9270; 312 F. 2d 749), but the Supreme Court of the United States granted a writ of certiorari and thereafter, in a per curiam decision, reversed the Court of Appeals (CCH 64-1 U.S.T.C. ¶9168) in this case as well as in a companion case, Meyer v. United States (CCH 64-1 U.S.T.C. ¶9111), and remanded the case back to the District Court with instructions to enter a decision in accordance with its holding in Meyer v. United States, supra. In Meyer v. United States, supra, the Supreme Court stated that it was erroneous to apply the doctrine of marshaling in this instance, for it would do violence to state policy which exempted life insurance proceeds from the claims of creditors of the deceased insured.

When the case was remanded, the United States asserted that it was nevertheless entitled to have its liens satisfied from the cash surrender value of the six remaining policies against which the bank released its liens and which was in the amount of $18,274.65 ($34,503.85 - $16,229.20).

The District Court sustained the Government's contention, for it found that the federal tax liens had affixed to the taxpayer-insured's interest in the cash surrender value of the policies but that they were subject to the senior lien of the bank. Moreover, the Court found that once the tax liens attached, they survived the death of taxpayer, and the beneficiary's interest in the death benefits payable under the policies was subject to the federal tax liens to the extent of the cash surrender values of the policies at the time of taxpayer's death.

Although the Court noted that the doctrine of marshaling did not apply, it stated that when the bank's senior lien became extinguished by virtue of its being satisfied from the maturity value proceeds of two of the eight policies, the United States was entitled to assert its liens against the $18,274.65 cash surrender value of the remaining six policies.

Staff: United States Attorney Merle M. McCurdy (N.D. Ohio); and Robert L. Handros (Tax Division).

Interest; Release of Tax Liens; Estate Held Liable for Correct Statutory Interest Even Though Internal Revenue Service, Which Had Erroneously Computed Interest Due, Issued Certificate of Release of Tax Liens Against Estate's Property. United States v. L. B. Bolt, Jr. et al. (E.D. Tenn., August 18, 1965). (CCH 65-2 U.S.T.C. ¶9656). The underlying tax liabilities in this matter were assessed in accordance with a decision of the Tax Court, but the decision was reversed and remanded by the Court of Appeals. Subsequently, liabilities in a smaller amount were stipulated in the Tax Court and a judgment was entered accordingly. The overassessments were abated, and, thereafter,

various payments were made to partially satisfy the judgment. Taxpayer's representative then asked the Internal Revenue Service to submit a statement of the remaining liabilities so that they could be paid. The Internal Revenue Service submitted a statement and the liabilities asserted thereon were paid by check marked "Final Settlement" and a Certificate of Release of Federal Tax Lien was issued. Within hours after the Certificate of Release was issued, the Internal Revenue Service realized that they had erroneously computed the remaining liabilities by failing to include interest on the assessed liabilities. After taxpayer refused to pay the corrected balance due, the Government brought suit to obtain judgment.

In holding that the Government was entitled to judgment, the Court stated that the issuance of the Certificate of Release did not bar the Government from obtaining judgment for interest on the assessed taxes, penalties and interest, since the Chief of the Special Procedures Section, who issued the Certificate of Release, had no authority to compromise interest due by statute, even if such compromise was made as asserted by the taxpayer. Section 7122, Internal Revenue Code of 1954, and related Income Tax Regulations; Botany Mills v. United States, 278 U.S. 282.

Staff: United States Attorney John H. Reddy (E.D. Tenn.) and Frank N. Gundlach (Tax Division).

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