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United States
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Vol. 14 No. 6

UNITED STATES ATTORNEYS
BULLETIN

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Vol. 14 March 18, 1966 No. 6

NEW APPOINTMENTS--DEPARTMENT

Assistant Deputy Attorney General Ernest C. Frieson has been appointed Assistant Attorney General for Administration.

The following nominations have been submitted to the Senate for confirmation:

Assistant Attorney General, Office of Legal Counsel - Frank M. Wozencraft
Assistant Attorney General, Tax Division - Mitchell Rogovin

NEW APPOINTMENTS--UNITED STATES ATTORNEYS

The nomination of the following new appointee as United States Attorney has been confirmed by the Senate:

Tennessee, Middle - Gilbert S. Merritt, Jr.

Mr. Merritt was born January 17, 1936 in Nashville, Tennessee, is married and has one child. He received his A.B. degree from Yale University in 1957, his LL.B. degree from Vanderbilt University in 1960, and his LL.M. degree from Harvard University Law School in 1962. He was admitted to the Bar of the State of Tennessee in 1960. From 1960 to 1963 he was associated with the firm of Boult, Hunt, Cummings & Conners in Nashville. During this period he was also Assistant Professor of Law, and later a part-time Lecturer in Law at Vanderbilt University. From 1963 up until his appointment as United States Attorney, Mr. Merritt was Associate Metropolitan Attorney for the Nashville Department of Law.

The nomination of the following incumbent United States Attorney to a new four-year term has been confirmed by the Senate:

Oklahoma, Northern - John M. Imel

The nomination of the following new appointee as United States Attorney has been submitted to the Senate for confirmation:

Nevada - Joseph L. Ward

In addition to those listed in previous issues of the Bulletin, the nomination of the following incumbent United States Attorney has been submitted to the Senate for confirmation:

Florida, Northern - Clinton L. Ashmore

MONTHLY TOTALS

During January the caseload rose by 378 cases over the preceding month. This marks the fifth time that the caseload has risen in the first seven months of fiscal 1966. Since June 30, 1965, the increase has totaled 1,826 cases, or 5.1 per cent. The reason for the increase is illustrated in the following comparison of cases filed, terminated and pending during the first seven months of fiscal 1965 and 1966, which shows a substantial gap in both years between the number of cases filed and the number terminated.

	First 7 Months Fiscal Year 1965	First 7 Months Fiscal Year 1966	Increase or Decrease Number	%
Filed				
Criminal	18,834	18,618	- 216	- 1.15
Civil	16,164	16,630	+ 466	+ 2.88
Total	34,998	35,248	+ 250	+ .71
Terminated				
Criminal	17,263	17,392	+ 129	+ .75
Civil	15,425	15,613	+ 188	+ 1.22
Total	32,688	33,005	+ 317	+ 1.97
Pending				
Criminal	11,620	12,268	+ 648	+ 5.58
Civil	26,050	24,874	-1,176	- 4.52
Total	37,670	37,142	- 528	- 1.40

From the standpoint of cases filed and terminated, January was a very productive month. More cases were filed in January than in any of the six preceding months, and more cases were terminated than in all but one of the six preceding months. As more cases were filed, however, the gap between filings and terminations increased. During January this gap was 10.6%, whereas the average for all seven months was only 6.7%.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,296	2,465	4,761	2,212	2,194	4,406
Aug.	2,585	2,555	5,140	1,870	2,245	4,115
Sept.	3,162	2,103	5,265	2,448	2,258	4,706
Oct.	2,702	2,415	5,117	3,078	2,507	5,585
Nov.	2,516	2,240	4,756	2,595	2,032	4,627
Dec.	2,534	2,310	4,844	2,688	2,028	4,716
Jan.	2,823	2,542	5,365	2,501	2,349	4,850

For the month of January, 1966, the United States Attorneys reported collections of $4,996,296. This brings the total for the first seven months of this fiscal year to $38,241,258. This is $4,349,870 or 10.21 per cent less than the $42,591,128 collected in the first seven months of fiscal year 1965.

During January $8,518,059 was saved in 112 suits in which the government as defendant was sued for $9,516,690. 55 of them involving $3,274,684 were

closed by compromises amounting to $584,420 and 19 of them involving $666,232 were closed by judgments amounting to $414,211. The remaining 38 suits involving $5,575,773 were won by the government. The total saved for the first seven months of the current fiscal year was $94,597,283 and is an increase of $25,640,410 or 37.18 per cent over the $68,956,873 saved during the first seven months in fiscal year 1965.

The cost of operating United States Attorneys' Offices for the first seven months of fiscal year 1966 amounted to $11,385,892 as compared to $10,933,285 for the first seven months of fiscal year 1965.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of January 31, 1966.

CASES

Criminal

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

CASES

Civil

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

CASES (Cont'd)

Civil (Cont'd)

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

MATTERS

Criminal

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

MATTERS

Civil

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

* * *

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Motions to Certify Order Denying Disclosure of Grand Jury Transcripts to Circuit Court of Appeals and to Transfer Case to Other Jurisdictions Denied. United States v. Max Factor & Co., (W. D. Mo.) D.J. File 60-21-113. On February 3, 1966, Judge John W. Oliver entered an opinion and order denying defendant's request for certification to the Eighth Circuit of the Court's January 12, 1966 order denying present disclosure of various grand jury transcripts to defense counsel and certain witnesses. Judge Oliver found that certification of an interlocutory appeal of that order would materially delay rather than advance the ultimate termination of the pending civil litigation charging a nation-wide conspiracy and combination to fix retail cosmetics prices and eliminate competition.

On February 4, 1966, Judge Oliver entered another opinion and order denying defendant's Section 1404(a) motion to transfer the case to either the Southern District of California or the Northern District of Illinois. The transfer motion had been briefed and argued earlier in the case. On May 25, 1965 the Court ruled that defendant had not sustained the burden of its motion under Section 1404(a) but reserved to defendant the right to renew the motion after additional discovery. On December 15, 1965, following additional pretrial conferences and extensive civil discovery, defendant renewed its motion and announced its intention to file supplementary transfer briefs and affidavits.

In the Court's ruling of February 4, 1966, Judge Oliver found that defendant Max Factor had not sustained its burden on the Section 1404(a) transfer motion. He noted first that there was no claim that plaintiff chose the Kansas City forum to vex and harass defendant. Then he stated that defendant made no showing, as is required under the authority of Section 1404(a), Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), and Van Dusen v. Barrack, 376 U.S. 612, 645 (1964), that "the initial forum is inconvenient; that another forum is more convenient; and that the interests of justice would be served by making a transfer."

Judge Oliver specifically noted the following considerations of convenience and justice in the Max Factor case: More witnesses reside in the present venue district than in any other. Defendant's central business location in the Southern District of California is not of paramount importance even to defendant as is apparent from defendant's own willingness that the case be transferred to the Northern District of Illinois. Defendant had urged that its extensive warehouse and office facilities in Chicago would minimize disruption of its business should trial be held in the Northen District of Illinois; and that counsel for both sides had offices in Chicago. The location of the documentary evidence in Max Factor's Los Angeles headquarters, the Court found, is only of minimal importance in regard to transfer as the evidence in this case is less voluminous than that usually encountered in antitrust trials.

Finally, in response to defendant's chief claim that fairness and equal treatment require a transfer to either California or Illinois, both fair trade jurisdictions, because the United States v. Revlon, Inc., Civil Action No. 62

Civ. 2219, is being tried in the fair trade State of New York, and because the recent United States v. Chas. Pfizer & Co., Inc., Civil Action No. 15290-1, consent Judgment is in part contingent on the Revlon outcome, the Judge said:

> We cannot understand how the Southern District of California or the Northern District of Illinois will be in any better position to rule those questions [construction of the "fair trade" laws of numerous States] than this court.
>
> The McGuire Act, 15 U.S.C. Section 45, is federal legislation and its construction is controlled by federal, not State laws. The problems of determining the rules of decision in the various fair trade states that may become involved are no more complicated for a district judge sitting in a non-fair trade state.

Judge Oliver summed up his interpretation of transfer problems as follows:

> Section 1404(a) was not designed for the purpose of affording a defendant sued for an alleged violation of the antitrust laws the right to insist that plaintiff's choice of forum in every antitrust action shall be made the subject of primary legal skirmish in which the defendant is entitled to make its choice of forum unless the plaintiff establishes that its initial choice was proper.

This transfer denial was made before opposing counsel's embarkation on a 12-week deposition schedule, presumably the last stage of extensive civil pre-trial discovery efforts.

In an effort to extract, clarify, and summarize the precise controversies that will remain in this lawsuit after discovery, Judge Oliver in a second part to this transfer denial entered an interesting order for upcoming post discovery pre-trial proceedings. Worth noting is the requirement for Government counsel, at the conclusion of all discovery, to file on May 5, 1966, a detailed written pre-trial factual brief consisting of a narrative statement of all facts to be proved by plaintiff, set forth in simple declarative sentences separately numbered, devoid of color words, labels or legal conclusions, capable of being admitted or denied by defendant. A corresponding requirement is made of defendant to so admit or deny each statement by May 23, 1966, and to present similar statements of any affirmative facts the defense may wish to prove at trial. The Government at that time will have ten days in which to reply.

Staff: Robert L. Eisen, James E. Mann, Raymond P. Hernacki and John M. Furlong (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

NON-APPROPRIATED FUND INSTRUMENTALITIES ACT

Employee Covered by Non-Appropriated Fund Instrumentalities Act, Who Is "Member of a Crew," Is Entitled to Benefits Under Longshoremen's And Harbor Workers' Compensation Act. Aetna Insurance Co. v. William M. O'Keeffe (C.A. 5, No. 22133, February 21, 1966). D.J. File 83-17-2. Claimant was employed by a non-appropriated fund instrumentality as a "deck hand" on a pleasure fishing vessel at Eglin Air Force Base. He was injured in the course of this employment, and sought compensation pursuant to the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Non-Appropriated Fund Instrumentalities Act (5 U.S.C. 150k-1).

The position of the employer's insurance carrier was that the Fund Act, extending the Longshoremen's Act, adopts the Longshoremen's Act's exclusion of any claimant who is "a member of a crew of any vessel"; the carrier argued that claimant was a member of the crew and that the Deputy Commissioner, therefore, lacked jurisdiction to consider his claim for compensation.

The Fifth Circuit affirmed the Deputy Commissioner's award of benefits, and, accepting our contention, held in this case of first impression, that the "crew member" exclusion of the Longshoremen's Act is not incorporated by the Fund Act.

Staff: Florence Wagman Roisman (Civil Division)

SOCIAL SECURITY ACT

Secretary's Determination That Claimant Not Disabled by Hypertensive Vascular Disease Held Not Supported by Substantial Evidence. Clara R. Heslep v. Celebrezze (C.A. 4, No. 10055, January 31, 1966). D.J. File 137-80-104. The Secretary, relying upon a regulation providing that "generally, hypertensive disease does not cause severe loss of capacity until it becomes severe enough to cause significant abnormalities in one or more of the four main end-organs; i.e., the heart, the brain, the kidneys or the eyes," 20 C.F.R. 404.1514(d), held that claimant's greatly inflated blood pressure did not disable her from substantial gainful activity. The Court of Appeals, while stating that it cast no doubt upon the validity of this regulation, held that "the rejection of the claim was the product of an arbitrary and mechanical application of a regulation designed as a guide, not a rigid rule."

Staff: Assistant United States Attorney H. Garnett Scott (W.D. Va.)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

DISMISSAL OF COMPLAINT - NOTICE TO DEFENDANT

Unnecessary Travel Because of Failure to Notify Defendant That Charges Have Been Dismissed. A case has recently been brought to the attention of the Department in which an individual was arrested in a district on a complaint and warrant issued in a district 1,500 miles from the district of arrest. He was released on bond to appear in the distant district. Shortly thereafter the charges were dismissed but the defendant was not notified. Several months later not knowing that the complaint had been dismissed he traveled to the distant district to answer the charges.

In order to obviate the hardship of such cases, it is requested that United States Attorneys take the necessary steps in appropriate cases to notify defendants or their counsel when charges are dismissed.

COLLECTIONS

Disposition of Proceeds of Judgments Under 18 U.S.C. 35(a). The Criminal Division has recently received several inquiries as to the proper manner of handling monies recovered from judgments under the recently amended "Bomb Hoax" statute, 18 U.S.C. 35(a). Since the penalty created by Section 35(a) is a civil penalty rather than a penalty for violation of a criminal statute recovered through a civil action, the proceeds of judgments under this section should be dealt with in accordance with Department Memorandum No. 207, Second Revision, March 10, 1958. Because the Department of Justice is the complaining department, these monies should be sent to the Budget and Accounts Office, Administrative Division, Department of Justice, Washington, D. C.

BRIBERY

Payments Made to Air Force Sergeant to Induce Him to Perform Acts in Violation of His Lawful Duty of Complying with Air Force Regulations Are Violative of Section 201, Title 18, United States Code. Parks v. United States (C.A. 5, December 10, 1965). Edgar Earl Parks, Vice President of Continental Fidelity Life Insurance Company, and co-defendant Dunn, President of the company, were indicted in the Western District of Texas on a thirteen-count indictment. Ten of the counts charged defendants with paying money to Air Force Sergeant Arthur T. Shand to induce Shand to deliver to the defendants or their company a list of names of basic trainees at Lackland Air Force Base and their parents' names and addresses; two counts charged defendants with promising and offering money to Shand for the same purpose; and the last count charged a conspiracy. Prior to trial, Dunn died. Parks was convicted on all counts. The arrangement with Sergeant Shand was originally to pay 15 cents and later 25 cents per name for the names of all new recruits. Parks made or caused to be made about 250 separate payments totaling approximately $27,000. The information thus obtained was the basis of immediate solicitation of a family to purchase insurance on

the life of the airman. The Court of Appeals, in affirming the conviction, said that whether or not these payments were given with the intent to influence the employee's "action" on a "matter pending" before him, it cannot be seriously doubted that the payments were made to "induce him to do an act in violation of his lawful duty" of complying with Air Force Regulations dealing with the operation of Lackland Air Force Base. The Court of Appeals denied a petition for rehearing on January 20, 1966, and in so doing said that it approved the principles of those cases holding that the language of the statute "with intent to influence his . . . action on any . . . matter . . . pending . . . before him," comprehends an intent to influence Sergeant Shand to sell the names of the recruits which were in his custody and control. The Court further stated that it believed the conduct falls within the language "with intent to commit . . . any fraud . . . on the United States . . ."

Staff: United States Attorney Ernest Morgan (W.D. Texas).

MAIL FRAUD

Production of Letter Mailed in Response to Advertisement or Proof of Its Contents Not Essential. United States v. Edward Earl Hopkins (C.A. 6, February 17, 1966). Appellant was convicted of two counts of mail fraud in connection with a scheme to obtain money from persons induced to purchase home building materials, paying in advance for same when Hopkins had no intention of making delivery. Count I specifically alleged that on a certain date in furtherance of the fraudulent scheme, defendant caused a letter to be mailed by a party interested in such home improvement.

In attacking his conviction on this count appellant posed the following question:

> "Can a defendant who has been charged with causing the mailing of a letter for the purpose of executing a scheme to defraud be convicted of mail fraud when there is no proof either of the content or of the tenor of the letter?"

While this letter was not introduced in evidence nor was there any testimony as to its contents, the writer did testify that she and her husband read appellant's advertisement and her husband instructed her to answer. She did so and subsequently received a phone call from appellant who asked if she was the one who answered the ad and was interested in building a home. Having thus established a mailing it was still necessary to show it was in furtherance of the scheme. The Court of Appeals said that the contents of the mailing were not controlling and on the record it appeared that but for the letter in question the writer and the appellant would not have come into contact with each other. Proof as to the specifics of said letter, under these circumstances, was therefore not essential.

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Judically Salvaged Drug Becomes "New Drug"; Protection of "Grandfather Clause" Lost Despite District Court Approval of Relabeling and Reduction of Claims Where Drug Would Not Be Generally Recognized as Safe and Effective.

United States v. Allan Drug Corporation (C.A. 10, February 18, 1966). The District Court at Denver, Colorado, condemned an acne preparation named Halsion but, under the salvage provisions of the Federal Food, Drug, and Cosmetic Act, approved relabeling of the product to limit its use to those suffering "mild" cases of acne who would practice a program in personal hygiene. The Government appealed, contending that the new labeling still misbranded the drug and prevented marketing of the drug absent compliance with "new drug" procedures. The Tenth Circuit held (2-1) that, although the changed labeling merely reduced the uses of the drug, Halsion lost the protection of the "grandfather clause" because (1) the drug would no longer be intended "solely for use under conditions prescribed, recommended or suggested in labeling with respect to such drug" prior to the enactment date of the 1962 Amendments, and (2) the District Court found the drug ineffective for the uses as stated in the original labeling. /See 21 USCA 321, 355./ In the majority view, judicial salvage would be operable only to change labeling of a misbranded drug to limit its uses to those for which the drug is generally recognized as safe and effective. Thus the Court of Appeals aborted the relabeling of Halsion.

Staff: United States Attorney Lawrence M. Henry; Assistant United States Attorney David I. Shedroff (D. Colo.)

LABOR-MANAGEMENT RELATIONS ACT

Convictions of Union Officials Upheld; Jurisdictional Proof Required Under 29 U.S.C. 186. United States v. Ricciardi, and United States v. Unger (C.A. 2, February 4, 1966). D.J. File No. _____ Defendants Ricciardi and Unger were vice-president and secretary-treasurer, respectively, of Local 32-E, Building Service Employees International Union. The Union's membership included the superintendents of approximately 5,500 Bronx and Westchester apartment houses, employees at country clubs in Westchester, 600 employees at Yonkers Raceway, employees at Klein's Department Store and Freedomland Amusement Park. Both defendants were charged under 29 U.S.C. 186(a)(1), (b)(1) as representatives of employees who were employed in an industry affecting commerce, with having unlawfully received money from employers of such employees. In each case the employer was an apartment house owner. Unger was also charged with unlawfully receiving loans. The defendants were tried separately.

At Unger's trial, the Court submitted the jurisdictional issue to the jury. The Court charged that in determining whether an "industry affecting commerce" was involved, the jury could consider all employers under contract with the union and not just those apartment house owner-employers mentioned in the indictment. The jury therefore was allowed to consider the fact that union members were employed at Yonkers Raceway and Klein's Department Store.

At Ricciardi's trial, the Court refused to receive proof on the employees at Yonkers and Klein's, and ruled that the relevant industry was the apartment house industry which included not only the employers mentioned in the indictment but all others in the Bronx. The Court charged that the jury could find that union members employed in this industry were in an "industry affecting commerce" if a labor dispute would diminish the flow of concededly out-of-state fuels.

The Court of Appeals upheld the convictions. The Court ruled that the trial court's test in Ricciardi was the proper one but that since the question of jurisdiction was in any event one of law for the court, the error in the Court's charge in Unger was of no consequence. All that is for the jury on this issue is the credibility of the witnesses who testify as to the physical facts which support jurisdiction. The Court also said that it would take judicial notice of the fact that a labor dispute in the relevant industry would "burden or obstruct commerce or tend to burden or obstruct commerce" within the meaning of 29 U.S.C. 142 by reducing the flow of fuel oil. The Court held that although the Government had failed to prove at Unger's trial how much fuel was actually used in the industry, it was obviously enough to affect commerce.

The Court also rejected Unger's contention that loans made to a union official by an employer with whom he has a personal relationship are not within the purview of the statute.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Neil Peck, Richard A. Givens and Douglas S. Liebhafsky (S.D. N.Y.).

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IMMIGRATION AND NATURALIZATION SERVICE

COMMISSIONER RAYMOND F. FARRELL

DEPORTATION

Administrative Denial of Stay of Deportation Upheld. Wu Ching Sho v. Esperdy (S.D.N.Y., 66 Civ. 330, February 25, 1966) D.J. File 39-51-2695. Plaintiff, a national of the Republic of China of Formosa, entered the United States as an alien crewman on June 5, 1964 and deserted his vessel. He was apprehended in November 1965 and placed under deportation proceedings. After failing to take advantage of an order permitting him to depart voluntarily in lieu of deportation, he was notified to surrender for deportation on February 4, 1966. Plaintiff then requested defendant to stay his deportation until a final decision was rendered on a petition to accord him preference in the obtaining of an immigrant visa under Section 203 (a) (6) of the Immigration and Nationality Act, as amended 8 U.S.C. 1153 (a) (6) Defendant, the District Director of the Immigration and Naturalization Service denied a stay on the ground that the approval of plaintiff's visa petition was conjectural and that, even if the petition were approved, plaintiff would have to depart from the United States to obtain an immigrant visa.

Plaintiff filed this declaratory judgment action contending that defendant's denial of stay was arbitrary, capricious and an abuse of administrative discretion and requested the Court to stay his deportation. He alleged that he could not submit his visa petition until he secured a certification from the Department of Labor required by the regulations and that if he were deported at this time his deportation would cause irreparable harm to the business of his employer, a United States firm. The Court denied the relief sought by plaintiff finding no abuse of discretion by defendant because plaintiff must eventually depart from the United States . In the Court's opinion plaintiff's convenience or that of his employer supplied no basis for interference by the Court in the exercise of the discretion vested in defendant.

Staff: United States Attorney Robert M. Morgenthau (S.D.N.Y.)
Special Assistant U.S. Attorney Francis J. Lyons of Counsel

* * *

TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

CRIMINAL TAX MATTERS
Court of Appeals Decisions

Aiding and Assisting, etc., in Preparing False Tax Returns (26 U.S.C. 7206(2)); Certified Public Accountant Criminally Liable for Devising Improper Corporate Tax Deduction Scheme Based on Capital Stock Issued as "Officers' Salaries" to Employees Serving as Nominal Officers, Who Immediately Returned Stock With Blank Endorsements. Hedrick v. United States (C.A. 10, No. 8206; February 28, 1966). In view of the lack of bona fides in the stock transactions, the Court of Appeals refused to be controlled by the tax rule that no taxable income is realized by stockholders to whom stock is issued in the exact proportion of their prior stock ownership. Eisner v. Macomber, 252 U.S. 189; Daggitt, 23 T. C. 31. Nor did legal advice constitute a defense where the attorney was not advised of the sham nature of the stock transactions. Additional large fraudulent deductions were based on sham "management fees" juggled back and forth between several related and wholly owned corporations. The Court also rejected arguments based on use of summary schedules and an allegedly excessive sentence of five years.

Staff: John P. Burke and Willard C. McBride (Tax Division)

Income Tax Evasion--Use of Summary of Government's Evidence Prepared by Treasury Agent Who Testified. Sam G. Myers v. United States (C.A. 5) February 14, 1966. Appellant, convicted of income tax evasion, vigorously attacked the use at his trial of a summary of unreported income prepared by the Treasury agent, contending that it was prejudicial because it did not include all of the evidence. The Court of Appeals found no merit in the argument. Although warning that the preparation and use of such summaries "must be carefully handled by the trial judge", the Court pointed out that they have frequently been used in the Fifth Circuit and elsewhere in tax evasion cases where the facts are voluminous and complicated. The Court agreed that the summary did not include all of the evidence, or appellant's theories of the case, but pointed out that it did not purport to. No impropriety in its use was found in view of the fact that the summary did not contain anything not in the record, identified in detail the evidence summarized, and in view of the trial judge's instructions regarding it.

Staff: United States Attorney Woodrow Seals and Assistant United States Attorneys Morton L. Susman, Jerald D. Mize and James R. Gough (S.D. Texas)

Internal Revenue Summons; Taxpayer Must Produce Records for "Barred" Years When Concededly Relevant to Examination of Current "Open" Years, and Government Need Not Allege or Prove Fraud. H. Mitchell Dunn, Jr. v. A. C. Ross, District Director (C.A. 5), February 4, 1966 (C.C.H. 66-1 U.S.T.C. par. 9238). The Regional Commissioner notified taxpayer that it was necessary (see Section 7605 (b)) to examine his returns and records for 1935 through 1955 in order to determine his tax liability for current years. A summons for production was

served and the Government's petition to enforce it contained the verified allegation that taxpayer claimed large annual farm losses in returns for 1961, 1962 and 1963, but it made no allegation of fraud. On appeal from an enforcement order, taxpayer conceded that United States v. Powell, 379 U.S. 48, dispensed with any need to prove probable cause to suspect fraud, but argued that fraud must at least be alleged in order to compel the production of records for closed years. The Court of Appeals affirmed, reaching the fairly inescapable conclusion that, when open years (i.e., years not barred by the statute of limitations) are under examination, Section 7602 (1954 Code) authorizes the examination of all relevant material. Here, it was undisputed that a long history of farm losses (which the summonsed records might show) would be relevant in deciding whether current farm losses were deductible as incurred in a business enterprise or, conversely, were merely incurred in pursuit of a hobby. The Court cited, as examples of the relevance of old records to an examination of open years, regardless of fraud in the earlier years, Falsone v. United States, 205 F. 2d 734 (C.A. 5), and Norda Essential Oil Co. v. United States, 230 F. 2d 764 (C.A. 2). The Court noted, however, that in a case where a summons calls for a vast quantity of records, the district court has a broad discretionary power to limit its order appropriately.

Staff: John M. Brant and Joseph M. Howard (Tax Division)
Assistant United States Attorney Richard C. Chadwick (S.D. Georgia)

District Court Decision

Enforcement of Special Agent's Summonses; Witness Fees Allowed. United States and Samuel S. Forman v. Martin Lemlich (S.D. Fla., January 10, 1966). (CCH 66-1 U.S.T.C. Par. 9184). A Special Agent of the Internal Revenue Service served summonses upon respondent Lemlich, the president of five corporations, directing him to appear, give testimony, and produce for examination books and records of the corporations in connection with an investigation of the corporations' withholding tax liabilities. Upon respondent's failure to appear, the United States instituted an enforcement action, and the Court issued an order to show cause. In response thereto, respondent contended, inter alia, that the summonses were invalid in that they did not contain a pledge for payment of witness fees and mileage as provided by 5 U.S.C. 95a. The District Court (Judge Fulton) held that the examination called for in the summonses was a "hearing" within the meaning of 5 U.S.C. 95a and that, pursuant to that section, respondent was entitled to a witness fee at such future time, fixed by the Internal Revenue Service, as he appeared in response to the summonses.

Staff: United States Attorney William A. Meadows, Jr.,
Assistant United States Attorney Alfred E. Sapp, (S.D. Fla.);
and Harry D. Shapiro (Tax Division).

Note: The Internal Revenue Service has advised that henceforth it will voluntarily pay a witness fee pursuant to 5 U.S.C. 95a in cases where the witness demands payment of a fee prior to appearing in response to an Internal Revenue summons. Meanwhile, the Service is asking the Comptroller General for an opinion as to the legality of such payment; if the opinion concludes that the Service has no authority to make such payment, the Service will reconsider its position.

CIVIL TAX MATTERS
District Court Decisions

Tax Liens; Pledgee Bank Entitled to Priority Over Government's Tax Liens on Two Checking Accounts Standing in Name of Delinquent Taxpayers; Lien of Pledgee Bank Perfected Before Tax Liens Filed. United States v. Harris, et al. (W.D. La., February 2, 1966). (CCH 66-1 U.S.T.C. Par. 9180). Suit was brought by the United States to foreclose its tax lien on two checking accounts of the taxpayers. Prior to the time assessment was made, taxpayers became indebted to the Pioneer Bank & Trust Company in the original amount of $2,061.67, under a promissory note executed by taxpayer, William T. Harris, dated January 29, 1963. The note provided that the holder had the right at any time to set-off any amount that either the maker, endorser, or guarantor had on deposit with the bank, whether such deposit was general or special, and whether the note was then due or not. To secure their indebtedness taxpayers executed collateral pledge agreements which provided that should any indebtedness secured by the agreement become due, any and all funds deposited to the credit of either or both of the taxpayers in the possession of the bank could be applied in reduction of the secured debt.

The income tax liability of $4,244.69 was assessed on May 17, 1963. Notice of tax lien was filed on August 23, 1963 and notice of levy was served on the bank on November 29, 1963. After receipt of the notice of levy, the bank sought to enforce its right to set-off by charging both accounts with the entire sums on deposit, totaling $760.17, and applying this sum to taxpayers' debt.

The Court distinguished the instant case from Bank of Nevada v. United States, 251 F. 2d 820 (C.A. 9, 1958), cert. denied 356 U.S., and United States v. Bank of America National Trust & Savings Ass'n., 229 F. Supp. 906 (S.D. Calif., 1964) aff'd 345 F. 2d 624 (C.A. 9, 1965) on the ground that, under the set-off agreement, taxpayers' obligation to the bank in the instant case arose prior to the date of assessment and prior to the attachment of the Federal tax lien under Section 6321. Passing this distinction, the Court held that the bank was a pledgee, within the meaning of Sec. 6323(a), of credits represented by the taxpayers' bank deposits under the collateral pledge agreement executed prior to the tax assessment. Applying the federal test of "choateness," the Court found: (1) the identity of the lienor - the pledgee, (2) the property subject to the lien - the bank accounts of the taxpayers and (3) the amount of the lien - the amount of money on deposit in the checking accounts. In this regard, the Court declared that United States v. Crest Finance Co., 368 U.S. 347 was controlling. It therefore granted the bank's motion for summary judgment.

The matter of appeal is still under consideration.

Staff: United States Attorney Edward L. Shaheen; Assistant United States Attorney Edward L. Boagni, (W.D. La.); and Sherin V. Reynolds (Tax Division).

Recordation of Federal Tax Liens. United States v. Sirico, et al. (S.D. N.Y., December 7, 1965). (CCH 66-1 U.S.T.C. Par. 9209). The United States filed a notice of federal tax lien against defendant-taxpayers (husband and wife) more than three years prior to the time taxpayers' grantees executed a first mortgage on their property. The mortgagee contended that its mortgage was superior to the federal tax lien, notwithstanding the fact that the federal tax lien was filed more than three years before the first mortgage was recorded. Its contention was based upon an alleged misdescription in the notice of the federal tax lien filed by the District Director. Specifically, the mortgagee claimed that the notice of federal tax lien did not give constructive notice of the lien because one of the taxpayers, Assunta Sirico, was referred to only by the initial of her first name, that is, "A. Sirico," rather than by her full name. The Court held that the mere fact that there is an addition, omission or substitution of letters in a name, in and of itself, does not invalidate a notice. The essential purpose of the filing of the lien is to give constructive notice. Thus, the test is not absolute perfection, but rather substantial compliance sufficient to give constructive notice and alert one to the Government's claim. Here, the notice set forth the correct surname and the correct address, which address was the subject of the title search. The mortgagees must, therefore, be charged with constructive notice of the lien because due diligence in examining the records would have disclosed the existence of the lien.

Staff: United States Attorney Robert M. Morgenthau and
Assistant United States Attorney Edward L. Smith, (S.D. N.Y.).

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