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DEPARTMENT OF JUSTICE

Vol. 14 No. 22

UNITED STATES ATTORNEYS

BULLETIN

NEW EXECUTIVE OFFICE HEAD

On September 27, 1966 the appointment of John W. Kern, III as head of the Executive Office for United States Attorneys was announced by the Attorney General.

Mr. Kern was born May 25, 1928 in Indianapolis, Indiana. He received a B.A. degree from Princeton University and an LL.B. from the Harvard Law School. Following graduation in 1952, he was with the Central Intelligence Agency for two years.

In 1954 and 1955, he was a law clerk to Harold M. Stephens, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, and then was an Assistant United States Attorney for the District of Columbia until 1959.

At that time, he joined a law firm in Washington, D. C., and was in private practice until he entered the Department in October, 1965, as Staff Assistant to Assistant Attorney General Fred M. Vinson, Jr. Since January, 1966, he has been Chief of the Legislation and Special Projects Section of the Criminal Division.

Mr. Kern is married and has two sons.

In making the announcement, the Attorney General pointed out that Mr. Kern is particularly equipped for his new post because he has worked both in a Division of the Department and as an Assistant United States Attorney.

UNITED STATES ATTORNEYS BULLETIN

Vol. 14 October 28, 1966 No. 22

NEW APPOINTMENTS -- DEPARTMENT

The nomination of Harold B. Sanders as Assistant Attorney General, Civil Division, has been confirmed by the Senate.

APPOINTMENTS -- UNITED STATES ATTORNEYS

The nominations of the following incumbent United States Attorneys to new four-year terms have been confirmed by the Senate:

Arkansas, Eastern - Robert D. Smith, Jr.
Arkansas, Western - Charles M. Conway

The nominations of the following United States Attorneys as Federal district judges have been confirmed by the Senate:

Arizona - William P. Copple
California, Central - Manual L. Real

The nominations of the following new appointees as United States Attorneys have been confirmed by the Senate:

California, Eastern - John P. Hyland

Mr. Hyland was born April 7, 1920 at Cleveland, Ohio and is married. He attended City College of San Francisco from 1947 to 1948, and the University of San Francisco Law School from 1948 to 1952, when he received his LL.B. degree. He was admitted to the Bar of the State of California in 1953. From 1953 up to his appointment as United States Attorney he was engaged in the private practice of law, first in San Francisco and subsequently in Visalia, California. From 1955 to 1957 he was Deputy Assistant Attorney, and in 1957, Assistant District Attorney of Tulare County, California.

California, Southern - Edwin L. Miller, Jr.

Mr. Miller was born January 17, 1926 at Los Angeles, California, is married and has one child. He attended Dartmouth College from 1943 to 1944 and from 1946 to 1947, when he received an A.B. degree. He also took a post graduate course in business administration from 1947 to 1948 at Dartmouth. From 1954 to 1957 he attended the University of California at Los Angeles where he received his LL.B. degree. He was admitted to the Bar of the State of California in 1958. From 1944 to 1946 he served as an Ensign in the United States Naval Reserve. After private practice in San Diego, Mr. Miller was employed by the San Diego City Attorney's office from 1959 to 1961, during part of which time he served as Assistant City Prosecutor. From 1961 to 1964 he was employed as a Public Utilities Legal Representative, and from 1964 up to his appointment as United States Attorney, he served as Assistant City Attorney.

Ohio, Southern - Robert M. Draper

Mr. Draper was born January 7, 1906 at Rosewood, Ohio, is married, and has two children. He attended Ohio State University at Columbus, Ohio from 1924 to 1931, when he received his LL.B. degree. He was admitted to the Bar of the State of Ohio in 1932. Except for the period 1955-1962 when he served as Judge of the Court of Common Pleas, Mr. Draper was engaged in the private practice of law in Columbus, Ohio from 1932 to 1966. During this time he was also a member of the Columbus Board of Education (1940-1951), and Commissioner of the Metropolitan Housing Authority (1963 to 1966).

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Complaint and Proposed Judgment Charging Violation of Section 1 of Sherman Act. United States v. Ehrenreich Photo-Optical Industries, Inc. (E.D. N.Y.) D.J. File 60-42-20. On September 29, 1966, a complaint was filed in Brooklyn, New York, charging Ehrenreich Photo-Optical Industries, Inc. with a violation of Section 1 of the Sherman Act.

The complaint alleges that Ehrenreich, through its subsidiaries, has violated Section 1 by entering into contracts and agreements with its retailers for the purpose of preventing price competition among them in the sale of its photographic products to the public. These contracts provide that defendant's retailer-customers shall sell defendant's products at prices fixed by defendant; shall not sell them to other retailers; and shall refrain from selling photographic products of defendant's competitors for use in combination with defendant's photographic products as the forbidden practice may serve as a device for discounting defendant's products.

Ehenreich, through Nikon Incorporated, Caprod Ltd., Fuji Photo Optical Products, Inc., Durst (USA) Inc. and Gary Lehmann, Inc., all wholly-owned and controlled subsidiaries, distributes cameras, lenses, projectors, film processing equipment and other photographic products manufactured in Japan and Italy, and sold in this country under the trade names Nikon, Nikkorex, Nikkormat, Mamiya, Bronica, Fujica, Fuji and Durst. These products are distributed to approximately 3,000 retailers throughout the United States. The market for defendant's products consists of an estimated 2,500,000 advanced amateur photographers and 90,000 professional photographers. In the nine-month period ending January 31, 1966, defendant's sales of products to that market were approximately $10,000,000 at wholesale prices.

A proposed judgment, consented to by Ehrenreich, was filed, along with the complaint, with the usual 30-day stipulation. The decree enjoins Ehrenreich from entering into any contract, agreement, understanding, plan or program with any person or unilaterally to (1) fix the resale price of, (2) restrict the resale of, or (3) boycott, or refuse to sell to any person its photographic products. Also, Ehrenreich may not refuse to sell to its dealers where the dealer resells to a discounter. The proposed consent decree contains a one-year moratorium on Ehrenreich's right to fair trade its products in states with fair trade laws. Finally, the judgment insures that Ehrenreich may not dishonor its warranty where a customer purchases its products from any retail store. It should be noted that Ehrenreich has agreed to cause each of the five wholly-owned subsidiaries to file with the Court, consents to be bound by this judgment as if they had been named parties.

Staff: John D. Swartz, Eugene Margolis and William D. Kilgore, Jr. (Antitrust Division)

Charge Service Plan Conducted by Bank Alleged To Be in Violation of Sections 1 and 2 of Sherman Act. United States v. The Bank of Virginia (E.D. Va.) D.J. File 60-293-14. On September 30, 1966, a complaint was filed in Richmond, Va., charging the Bank of Virginia with violations of Sections 1 and 2 of the Sherman Act. The violations charged do not involve the conventional commercial banking operations of the Bank, but arise out of the Bank's conduct of a regional charge service plan, called "Charge Plan", in the Richmond-Petersburg and Tidewater metropolitan areas of Virginia.

Under the Bank's plan, as in similar services in other areas, the Bank issues cards to a large number of potential retail purchasers, called "customer accounts." "Member merchants" contract with the Bank to accept these cards in making charge sales, and the Bank purchases the accounts receivable generated by such sales, thus assuming the risk and responsibility of collection. The Bank's charge plan agreement with member merchants provides that the Bank "shall have the sole right to purchase . . . from us [member merchants] . . . acceptable accounts receivable in any form . . . ." The complaint charges that the requirement of exclusivity imposed by the Bank restrains trade in violation of Section 1 of the Sherman Act, and is an attempt to monopolize in violation of Section 2.

The Bank has the most strongly established regional charge service in its area, with approximately 60,000 customer accounts, about 1,000 member merchants and a recent annual volume of charge plan business of about $12,500,000. The complaint charges that because of the strong position of the Bank in this business, many retail merchants have refrained from or ceased dealing with the Bank's competitors. The Bank's chief competitor is Central Charge Service, which is party to a 1962 consent decree enjoining it from its previous practice of requiring exclusivity from its member merchants.

Staff: Joe F. Nowlin, Gerald A. Connell and Joseph A. Tate (Antitrust Division)

Manufacturers of Dental Products Charged With Violation of Section 7 of Clayton Act. United States v. Pennsalt Chemicals Corporation, et al., United States v. The Dentists' Supply Company of New York, and United States v. Ritter Pfaudler Corporation (E.D. Pa.) D.J. File 60-0-37-731. On September 30, 1966, three complaints were filed, alleging that the acquisitions of retail dental distributors made by the three largest manufacturers of dental products violate Section 7 of the Clayton Act. It is alleged that as a result of the seven vertical acquisitions challenged in the complaints, the three largest manufacturers of dental equipment and supplies have become the three largest retail distributors.

Total retail sales of dental products (consisting of dental equipment, dental sundries, artificial teeth and dental precious metals) in 1963 amounted to approximately $238.5 million. These sales were made by approximately 622 dental supply houses. The defendants, which are the three largest manufacturers of these products, accounted for approximately 36% of total sales of dental products at the manufacturing level in 1963. In that same year, retail dental supply houses now owned by these defendants accounted for approximately 27% of total retail sales.

The complaint filed against Pennsalt Chemicals Corporation charged that Pennsalt, through its recently acquired subsidiary, S. S. White Company, has become the largest dental distributor in the country as a result of White's vertical acquisitions of the C. J. Beyer Dental Supply Company, H. J. Caulkins & Compnay, Doctors' Dental Supply, Inc., and White-Rafert Company, Inc. White now controls 42 retail dental stores in 17 states and the District of Columbia. During 1964, White's net sales totaled almost $43.6 million. White is an important manufacturer of dental equipment and sundries.

The second complaint charged that The Dentists' Supply Compnay of New York (Dentsply) is now the second largest distributor of dental products as the result of the acquisitions of The L. D. Caulk Company, a manufacturer and retail distributor of dental products, and Ransom & Randolph Company, also a manufacturer and retail distributor of dental products. During 1964, Dentsply had total net sales of almost $45.6 million. Dentsply accounts for approximately 70% of total sales of artificial teeth.

The complaint filed against Ritter Pfaudler Corporation charged that Ritter has become the third largest dental distributor in the country as the result of the acquisition of the M. F. Patterson Dental Supply Company of Delaware. During 1964, Ritter had total net sales of $41.6 million. Ritter accounts for approximately 50% of dental equipment used by dentists.

The complaints allege that non-integrated manufacturers of dental products may be foreclosed from or hindered in selling their products to the acquired dental supply houses, that non-integrated distributors may be foreclosed from acquiring dental products from the integrated manufacturers, that barriers to entry into the industry may be heightened, that incentives for reciprocal dealing among Ritter, White and Dentsply may be created and that concentration in the industry may be increased.

The cases are significant as an effort to deal with a marked trend of vertical integration affecting an entire industry. The suits request divestiture of the acquired companies, and a ban for ten years on further acquisitions of firms engaged in the manufacture, distribution or sale of dental products.

Staff: John F. Graybeal and Roy E. Green (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General J. William Doolittle

SUPREME COURT

AGRICULTURAL ADJUSTMENT ACT

Supreme Court Holds That Civil Penalty Imposed by Agricultural Adjustment Act for Producing Excess Wheat Is Applicable to Wheat Produced by, and Consumed on, State of Ohio's Institutional Farms. United States v. State of Ohio (Sup. Ct. No. 271, O.T. 1966; October 10, 1966) D.J. File 106-58-175. In the years 1954 through 1957 the State of Ohio planted wheat at a number of its penal and mental hygiene institutions in excess of the acreage allotments prescribed under the Agricultural Adjustment Act. The United States assessed penalties and obtained summary judgment in the United States district court. The Sixth Circuit reversed, holding that the wheat production, being intended entirely for consumption on the farms, had insufficient impact on interstate commerce to indicate that Congress intended the Act to apply. The Sixth Circuit's reversal was predicated on the additional ground that the Ohio Constitution prohibited sale of the state-grown wheat. The Government filed a petition for certiorari, arguing, inter alia, that without acreage control a producer, like Ohio, would be free to grow for its own consumption wheat that it would otherwise purchase, thereby affecting the market by diminishing the demand. The Supreme Court granted the Government's petition and, at the same time, citing Wickard v. Filburn, 317 U.S. 111, summarily reversed the judgment of the Sixth Circuit.

Staff: Morton Hollander and J.F. Bishop (Civil Division)

COURTS OF APPEALS

ADMIRALTY

Jones Act Recovery Against United States, Under Public Vessels Act, Is Exclusive of Any Rights Seamen May Have Against Private Employer; Claims for Unlimited Maintenance and Cure Awards, Raised After Limitation of Liability Has Been Decreed, Are Untimely; United States, Having Paid Damages Which Were to Be Divided, Is Entitled to Contribution. In the Matter of the Petition of Oskar Tiedemann & Co. and In the Matter of the Petition of the United States of America and Mathiasen's Tanker Industries, Inc. (C.A. 3, Nos. 15203, 15293 and 15280 and 15294 and 15281, September 12, 1966). D.J. File 61-15-29. These cases arose out of a collision between Tiedemann's vessel, the EINA II, and the tanker MISSION SAN FRANCISCO, owned by the United States and operated for the Government on a cost reimbursable basis by Mathiasen, a private corporation. Exoneration had been denied all parties, but the Court of Appeals had affirmed an order limiting the liability of Tiedemann. On these appeals, the Court dealt with various questions arising out of proceedings subsequent to the limitation of liability.

In Nos. 15203, 15392 and 15280, the Court of Appeals reversed the district court's imposition upon Tiedemann of unlimited liability for claims for

maintenance and cure, holding that these claims -- which had been presented during the limitation proceedings -- now were untimely insofar as they sought recovery over the amount limited. The Court also held that since the damages had been divided, and the United States had paid all but one of the claims, it was entitled to contribution from the limitation fund.

Nos. 15294 and 15281 concerned the one claim remaining unpaid. In addition to the seaman's Jones Act remedy against the Government, which had been allowed, the district court had awarded a Jones Act remedy against Mathiasen and a State Wrongful Death remedy against the United States. The Court of Appeals held that each of these awards was erroneous, the first because the Public Vessels Act precludes recovery against the contract operator, which it held Mathiasen to be, and the second because "the Supreme Court has clearly ruled that the Jones Act remedy is exclusive and, when applicable, bars relief against the same defendant under a state wrongful death statute."

Staff: Leavenworth Colby (Civil Division)

BANKRUPTCY -- AGRICULTURAL PENALTIES

Penalties for Overproduction of Cotton Recoverable in Bankruptcy to Extent They Represent Compensation for Pecuniary Loss to Government. United States v. Harry Moore, Trustee of Estate of Billie Sol Estes, Bankrupt (C.A. 5, No. 22371, September 21, 1966). D.J. File 120-76-116. The United States sought to recover, in bankruptcy, cotton marketing quota penalties assessed against Estes for producing cotton in excess of his allotments. The district court affirmed the referee's holding that these penalties constituted "penalties" within the meaning of Section 57(j) of the Bankruptcy Act (11 U.S.C. 93(j)) and therefore could not be allowed in the bankruptcy proceedings.

The Court of Appeals upheld this ruling, but accepted the Government's alternative contention that it could recover the penalties insofar as they constituted reparation for pecuniary loss incurred by the Government because of the overproduction of cotton -- despite the fact that the Government had not specifically alleged such loss in the proof of claim. Accordingly, the decision of the district court denying the Government's claim in its entirety was reversed, and the case was remanded to permit the Government to prove the amount, if any, of pecuniary loss sustained "from the conduct of the bankrupt in the penalty transactions."

Staff: Alan S. Rosenthal and Lawrence R. Schneider (Civil Division)

COLLATERAL ESTOPPEL BY JUDGMENT

Federal Law Controls Use of Prior Criminal Conviction in Civil Suit to Enforce Federal Claim; Judgment Against Converter of Government Property Upheld. United States v. Fabric Garment Co., Inc., et al. (C.A. 2, No. 462, September 13, 1966). D.J. File 52-51-192. The Government brought this suit against a contractor which allegedly had converted to its own use material furnished by the Government for the production of "Eisenhower jackets." The district court

rendered judgment for the United States, and the Second Circuit affirmed. The Court of Appeals approved the district court's use of prior criminal convictions, noting that "in an action to enforce a federal claim ***, the effect to be given a prior federal judgment is a matter of federal law," which permits the use of prior criminal convictions to establish facts in favor of the United States in a civil action against the defendant in the criminal action. The Court also approved the district court's establishment of the admittedly indeterminate damages, agreeing with the district court's requirement that the contractor "explain the size and nature of the damage once the Government had established both the fact of conversion and the approximate amount converted ***."

Staff: Louis S. Paige (Civil Division)

PACKERS AND STOCKYARDS ACT

Major Retail Concern Which Maintains Centralized Meat Facilities at Which Meat Food Products Are Prepared for Sale in Its Retail Stores Is "Packer" Within Meaning of Packers and Stockyards Act. Safeway Stores, Inc. v. Freeman (C.A.D.C., No. 19859) and The Great Atlantic and Pacific Tea Co., Inc. v. Freeman (C.A.D.C. No. 19860), October 6, 1966. D.J. Files 58-16-3 and 58-16-4. By these actions, consolidated on appeal, Safeway Stores and The Great Atlantic and Pacific Tea Company sought to overturn the determination by the Secretary of Agriculture that they are "packers" within the meaning of the Packers and Stockyards Act, 7 U.S.C. 181 et seq. If they are packers then each must file a report annually with the Secretary reporting in detail on the operations at its centralized meat facilities. The Secretary's conclusion that each was a packer was bottomed on the fact that each in fact maintains centralized meat facilities at which millions of pounds of carcasses annually are prepared into meat food products such as sausage and luncheon meats. Under the Act a "packer" is defined to include, in part, "any person engaged in the business * * * (b) of manufacturing or preparing meats or meat food products for sale or shipment into commerce * * *." 7 U.S.C. 191. Appellants argued that at their centralized plants they merely performed ordinary butcher shop operations and that the latter were not intended to be covered. The Court agreed with the Secretary, however, that since the products of their "butcher shop" operations were shipped in commerce they were covered by the Act. The Court also agreed with our broad definition of the statutory term "commerce", rejecting appellants' contention, in effect, that it did not embrace interstate commerce between different facets of the same concern. Finally, the Court made clear that a major retailer might well be subject to regulation by both the Secretary of Agriculture and the Federal Trade Commission; the former could regulate the centralized meat operations; the latter the non-meat aspects of the retail operation.

Staff: Edward Berlin (Civil Division)

SOCIAL SECURITY ACT - PRESUMPTION OF DEATH

Fact That Absentee Husband Was About to Be Charged With Embezzlement at Start of 7-Year Disappearance Is Sufficient Explanation Under 20 CFR 404.705 to Avoid Presumption of Death. Gardner v. Wilcox (C.A. 6, No. 20,639, September 19,

1966). D.J. File 137-81-37. In April 1953, the wage-earner was sought for explanation of missing funds. When advised of this fact, he wrote a letter to his wife intimating suicide, left his car near a river, and never was heard from thereafter. No body was found. The wife collected upon private insurance policies pursuant to a settlement decree in a state court. The Secretary of Health, Education and Welfare, however, denied the social security claim. His decision was set aside by the district court.

On the Secretary's appeal the Ninth Circuit reversed, stating that the charge of embezzlement, anticipated by the husband, was a sufficient explanation of the husband's disappearance under 20 CFR 404.705. Rather than sustaining the Secretary's decision, however, the Court remanded the case to the Secretary. The Court ruled that the hearing examiner had assumed that if any explanation appeared the absence must be deemed explained. The Court stated that the hearing examiner must now weigh the probabilities of suicide against those of mere flight, upon the basis of all the facts. If, upon such consideration a determination is made that an explanation exists and life is more probable than death, the Court indicated that such a determination is an essentially fact-finding function, and it is not for the courts to substitute their judgment.

Staff: J.F. Bishop (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

VENUE

Transfer of Federal Prisoners' Suits Filed in United States District Court, District of Columbia, to Districts Wherein Prisoners Are Incarcerated. In recent years federal prisoners have filed increasing numbers of action in the United States District Court for the District of Columbia challenging the procedures and decisions of the United States Board of Parole and Bureau of Prisons. The United States Attorney for the District of Columbia has successfully sought transfer of many of these suits to the district of the prisoner's incarceration, pursuant to recent opinions of the United States Court of Appeals for the District of Columbia Circuit which suggested the advisability of such transfers. Thus in Phillips v. United States Board of Parole, 122 U.S. App. D.C. 235, 352 F.2d 711, the Court noted that the District of Columbia courts should be relieved of attempting to decide cases brought by prisoners incarcerated far from Washington, D. C., based on events alleged to have occurred in far parts of the country.

A recent decision of the District of Columbia Court of Appeals in which two such cases were considered jointly, Young v. Bureau of Prisons, Misc. No. 2868; Rossello v. United States Board of Parole, Misc. No. 2874, decided September 28, 1966, has reaffirmed the necessity for transfer of these cases to the district of incarceration of the prisoner. The Court held that while there might be exceptional circumstances warranting retention of jurisdiction in the District of Columbia, such cases would be rare and that transfer to the district of incarceration is to be routinely accomplished after preliminary examination to determine whether a compelling reason would require litigation of the matter in the District of Columbia. United States Attorneys in those districts in which federal penal institutions are located are by this notice alerted to expect the receipt of such suits on transfer from the United States District Court for the District of Columbia.

Pursuant to the recent transfer of the work of the Federal Custody Unit from the Civil Rights Division to the Criminal Division, requests for assistance in defense of these suits should be addressed to the General Crimes Section of this Division. Assistance in suits involving the Bureau of Prisons may be obtained from the Office of the Legal Counsel to the Director of the Bureau of Prisons.

YOUTH CORRECTIONS ACT

Sentencing Under Youth Corrections Act on Guilty Pleas; Compliance With Rule 11, F.R. Crim. P. The March 20, 1964 edition of the Bulletin, Vol. 12, No. 6, p. 139 discussed the necessity for precise explanation of the provisions of the Youth Corrections Act where the defendant enters a plea of guilty to a substantive crime for which the maximum penalty is less than the maximum under the indeterminate sentencing of the Youth Act. This article noted that the

widely used Section 5010(b) of Title 18 U.S.C. provides for indeterminate sentencing of youths up to 26 years of age (extended from 22 years by 18 U.S.C. 4209), with a maximum of 6 years confinement during which special rehabilitative treatment is provided and during which conditional release can be granted at any time in the discretion of the Youth Division of the Parole Board. The attention of United States Attorneys was directed to the importance of the defendant fully understanding the sentencing provisions of the Youth Corrections Act and it was urged that if a defendant were suspected of having pleaded in ignorance of the potential sentence he should be permitted to withdraw his plea.

This directive concerning withdrawal of the plea was intended to apply at the time of sentencing in cases of suspected involuntary pleas. Withdrawal of pleas was not intended to be freely granted in collateral attacks upon the sentence. In such suits each case must be considered on its own merits. Generally in cases where there is a serious claim of confusion on sentencing a hearing with findings of facts by the court seems appropriate. Thus in Pilkington v. United States, 315 F.2d 204 (C.A. 4), the Court remanded the case for a hearing as to whether or not the plea had been in fact voluntary.

Apart from whether or not the plea was involuntary, if the court in sentencing the defendant mistakenly advised him that the maximum sentence was 5 years, it has been held that he should not be required to serve more than this. Workman v. United States, 337 F.2d 226 (C.A. 1). In accordance with the Workman decision the Department in response to a writ of certiorari in Marvel v. United States, 335 F.2d 101 (C.A. 5), requested and was granted a remand of the case by the Supreme Court to the District Court to determine whether the defendant had been misinformed as to the maximum sentence. Marvel v. United States, No. 476 Misc., 380 U.S. 262.

United States Attorneys are again urged to attempt to insure against future collateral attack by having the defendant fully advised before plea and sentence as to the maximum sentence he may receive under the Youth Corrections Act. Any questions that arise in sentencing under the Youth Act should be referred to the Criminal Division.

FEDERAL CORRUPT PRACTICES ACT ELECTIONEERING BY CORPORATION

Ninth Circuit Defines Prohibited Electioneering by Corporation and Holds Immaterial the Fact That Shareholders Gave Consent. United States v. Lewis Food Co., Inc. (C.A. 9, No. 20194, September 22, 1966). The defendant corporation was indicted in the Southern District of California for violations of 18 U.S.C. 610, which prohibits corporations and labor organizations from making any contribution or expenditure in connection with an election for federal office. The indictment charged that the corporation placed a paid advertisement in a California newspaper listing the voting records of each federal candidate in the Democratic and Republican primary elections and rating each candidate according to "the percentage of his votes cast in favor of constitutional principles." The District Court dismissed the indictment, on the grounds that the corporate expenditures in question did not constitute prohibited electioneering within the meaning of §610, and that the indictment was defective because

it failed to include the essential allegation that the corporate expenditures had been made contrary to the wishes of a stockholder.

The Court of Appeals for the Ninth Circuit reversed the judgment unanimously on both grounds. In remanding the case for trial, Judge Hamley for the Court held that a jury question was presented as to whether the advertisements sponsored by the corporation fell within the prohibition of §610, since a jury could reasonably find that the advertisements were intended to influence the public to vote against the candidates who received low ratings in the "constitutional principles" test.

The Court also found it immaterial that the shareholders of the corporation might have consented to the expenditures. The intent of Congress in enacting §610, said the Court, was to destroy the influence on elections that corporations might exercise through financial contributions. The Court concluded that if a corporation could avoid §610 simply by obtaining the unanimous consent of its shareholders, the statute would be rendered meaningless. (Circuit Judges Barnes and Hamley, District Judge Goodwin.)

Staff: United States Attorney Manuel L. Real;
Assistant United States Attorneys
John K. Van de Kamp and Burt S. Pines
(S.D. Calif.)

WITNESSES

Failure to Warn Witness of His Right to Silence and Right to Counsel During Grand Jury Investigation Will Not Bar Perjury Prosecution for False Testimony Given Before That Grand Jury. United States v. Joseph Ponti, No. 22460, (E.D. Pa., August 12, 1966). Ponti was subpoenaed as a witness before a Grand Jury which was investigating suspected violations of 18 U.S.C. 1952. It was material for the Grand Jury to be informed whether a crap game had been conducted on September 3, 1965 at 1237 S. 7th Street, Philadelphia. Ponti testified, in effect, that he was on the premises that day, but did not shoot crap and saw no crap game going on. He further denied saying to the FBI agents, "All I have been getting all day were threes and nines" or anything to that effect. This testimony was the basis for an indictment for perjury before a Grand Jury, 18 U.S.C. 1621.

Ponti filed a motion to dismiss based on the grounds that he was not apprised of the nature of the investigation, nor of his right to counsel and his privilege against self-incrimination.

The Court stated that there is no doubt that as a witness before a Grand Jury, the defendant was enveloped with the protections of the Fifth Amendment. But the scope of that Amendment extends only to past acts, not to those that are or may be committed in the future. The Court noted that when Ponti appeared before the Grand Jury, he had not yet committed the crime for which he was indicted, and that his ". . . criminal liability concurred with the words he first uttered to the . . . Grand Jury." United States v. Parker, 244 F.2d 943, 947 (C.A. 7, 1957), cert. denied, 355 U.S. 836 (1957). The Court held that the

failure to warn the defendant of his rights against self-incrimination furnished no insulation to defendant against a charge of perjury.

The Court pointed to the decision in United States v. Orta, 253 F.2d 312 (C.A. 5, 1958), cert. denied, 357 U.S. 905 (1958), and United States v. Parker, 244 F.2d 943 (C.A. 7, 1957), cert. denied, 355 U.S. 836 (1957), wherein it was held that a witness, ignorant and uninformed of his constitutional rights, might testify truthfully and thereafter assert the constitutional guaranty, but under no circumstances, however, could he commit perjury and successfully claim that the Constitution afforded him protection from prosecution for that crime.

Defendant sought to avoid the impact of these decisions with the argument that since they were decided, there has been a "doctrinal trend" in Supreme Court decisions which should induce the Court here to disregard their authority. The Court did not agree. The Court pointed to Escobedo v. Illinois, 378 U.S. 478 (1964), and its successor Miranda v. Arizona, 384 U.S. 436 (1966), wherein it was held that evidence which has been illegally (unconstitutionally) obtained may not be used as a basis for conviction. However, these decisions do not compel, or even suggest, the conclusion that perjury is now a permissible crime where constitutional rights may have been violated.

The Court expressed no opinion on whether evidence of a past crime obtained from a Grand Jury witness in the face of a failure to warn of rights to counsel and against self-incrimination would be admissible; or could form the basis of an indictment.

Staff: United States Attorney, Drew J. T. O'Keefe
(E.D. Pa.)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Public Lands: Mineral Claim; Failure to Perfect Appeal to Secretary From Decision Denying Plaintiff's Mining Claim. J. S. Devenny v. United States, et al. (W.D. Wash. July 1, 1966, D.J. File 90-1-18-685). The hearing examiner disallowed plaintiff's mining claim because he found there were not sufficient minerals to constitute a discovery of a valuable deposit, as required by statute. Devenny filed a notice of appeal in the office of the hearing examiner at Sacramento, California, on December 26, 1963, without a statement of reasons. Within 30 days he mailed a statement of reasons for appeal to the office of the hearing examiner where it was received on January 22, 1964. The hearing examiner transmitted the statement to the Director, Bureau of Land Management, who received it on February 4, 1964. The Department of the Interior's rules with respect to appeals provide that where the appeal is taken to the Director, the statement of reasons for appeal must be filed with the Director within 30 days after a notice of appeal is filed. In this case, claimant mailed his statement to the examiner instead of to the Director and by the time it reached the Director it was out of time. The Director denied the appeal. An appeal to the Secretary followed. The Secretary denied the appeal on the ground that the appeal to the Director was not timely perfected. The Court affirmed the Secretary's holding on the ground that plaintiff failed to exhaust his administrative remedies in that he did not comply with the applicable administrative regulations.

Staff: Assistant United States Attorney Stanley H. Barer (W.D. Wash.).

Federal Property; Liability for Real Estate Taxes; Land Acquired by Small Business Administration by Deed From Trustee in Bankruptcy of Estate of Insolvent Mortgagor; Construction of Waiver of Immunity. United States v. City of Roanoke (Civ. No. 66-C-47-R, W.D. Va., September 19, 1966, D.J. File 90-1-5-843). The Valley Development Corporation, Roanoke, Virginia, executed a note in the sum of $250,000, payable to the Small Business Administration, secured by a deed of trust to 9.069 acres of land. The company defaulted on its payments and later filed a petition in bankruptcy. The court in the bankruptcy proceeding directed the trustee of the insolvent's estate to sell, at public sale, the property covered by the deed of trust. The Small Business Administration was the successful bidder at the sale and received a deed to the property from the trustee. Following the sale and delivery of the deed, the City of Roanoke assessed the property for real estate taxes. Suit was instituted by the Government against the City for a declaratory judgment.

In its complaint, the Government contended that the property was immune from local real estate taxes. The City conceded that, absent consent by Congress, the property would not be subject to local taxation but asserted that the taxes were authorized by the provisions of 28 U.S.C. 960 and 15 U.S.C. 646. The former statute reads as follows: "Any officers and agents conducting any business under the authority of a United States Court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation." The Court held this

provision to be inapplicable, stating that its purpose was to make a business in receivership subject to taxation and that following the conveyance to the Government the property taxed was not subject to the direction or supervision of a court. The other statute, 15 U.S.C. 646, on which the City relied more heavily, provided: "Any interest held by the [Small Business] Administration in property as security for a loan, shall be subordinate to any lien on such property for taxes due on the property to a State, or political subdivision thereof, in any case where such lien would, under applicable state law, be superior to such interest if such interest were held by any party other than the United States." (Emphasis added.) Defendant argued that Congress must have intended that land held as a result of having been taken earlier as security would be encompassed by the language as security for a loan. The Court disagreed, however, with the City's position, pointing out that a waiver of federal immunity from local taxation must not only be expressed but it must be strictly construed and that, had Congress not intended to limit the imposition of local taxes to property held as security for a loan, it would have been a simple matter to have expressly so indicated.

Staff: United States Attorney, Thomas B. Mason (W.D. Va.).

Indians: Right of Organized Tribe to Control Sale of Alcoholic Beverages on Non-Indian Land Within Reservation Notwithstanding State License. United States v. Thomas, Civ. No. 65-83 C, and United States v. Wellner, Civ. No. 65-84 C, D. S. Dak. (D.J. Files 90-2-4-87 and 90-2-4-86). Defendants in the above cases possessed state licenses for the retail sale of alcoholic beverages and operated stores and taverns on non-Indian lands within the exterior boundaries of the Crow Creek Indian Reservation in South Dakota. The Tribal Council of the Crow Creek Tribe, an organized tribe, promulgated regulations prohibiting the sale of alcoholic beverages within the territorial limits of the reservation without license issued by the Tribe.

These actions were brought to enjoin defendants from continuing sales without license from the Tribe. The trial court granted the injunctions, holding that the tribal ordinance regulating the sale of alcoholic beverages within the reservation was valid and that 18 U.S.C. 1154, permitting generally the sale of such beverages, does not preclude the Tribe from regulating their sale.

Staff: Assistant United States Attorney Gene R. Bushnell (D. S. Dak.).

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

CIVIL TAX MATTERS
District Court Decisions

Federal Tax Liens: Priority of Creditors: Court Granted Government's Motion for Summary Judgment After Permitting Effective Date of Tax Lien To Be Amended by Interlineation. United States v. Lake City Malleable, Inc., et al. (N.D. Ohio, June 16, 1966), CCH 66-2 USTC ¶9581. A jeopardy assessment of nearly $400,000 was made against the corporate-defendant, Lake City Malleable, Inc. This action sought to reduce that assessment to judgment, as well as to assert a transferee liability against three other corporate defendants and Sidney L. Albert, who was the principal officer of all four of the corporations. Mr. Albert was a financier of some repute, who was subsequently convicted of S.E.C. violations and is presently incarcerated in a federal penitentiary. A lien foreclosure against real property owned by Mr. Albert was also requested in the complaint.

The principal issue in this proceeding involved the question of priority between the various claimants to the fund of money generated by the sale of Mr. Albert's real property. A typographical error in the Government's complaint established August 13, 1964, as the effective date of the tax lien, whereas, in reality, the lien was effective on August 13, 1958. The six year differential made a considerable difference in the ultimate position of the priorities of the various claimants. The Government sought to correct this error by a motion to amend the complaint by interlineation. The motion was granted by the Court, "in the interest of justice" and a favorable judgment was subsequently rendered on the plaintiff's motion for summary judgment.

Summit County, one of the fund claimants, sought to have the Court re-examine the wisdom of the "first in time, first in right" doctrine propounded in United States v. City of New Britain, 347 U.S. 81 (1954), and sought to contest the taxpayers' liabilities, but the Court made short shrift of both of these arguments.

Staff: United States Attorney Merle M. McCurdy; Assistant United States Attorney Bernard J. Stuplinski (N.D. Ohio); and Carl H. Miller (Tax Division).

Tax Liens; Ohio Liquor Licenses as Property to Which Tax Lien Attaches; Clarification. In the September 30, 1966 issue of the United States Attorneys Bulletin, Vol. 14, No. 20, it was reported that the Solicitor General has determined that the Government will not appeal the adverse decision in Paramount Finance Co. v. Cleveland's Peppermint Lounge, Inc. (Court of Common Pleas, Cuyahoga County, Ohio, December 6, 1965) (CCH 66-2 U.S.T.C., par. 9565). It should be noted, however, that the Government is not expressing its acquiescence in the Court's opinion in that case by its decision to not appeal. Indeed, the issue of whether an Ohio liquor permit constitutes "property" to which a federal tax lien attaches is now pending on appeal in the Sixth Circuit in the case of Paramount Finance Company v. U.S. (C.A. 6 - No. 17,005). The

only reason that the decision in Paramount Finance Company v. Cleveland's Peppermint Lounge, supra, was not appealed is that in that case, unlike the aforementioned case on appeal, the competing mortgagee had secured the appointment of a receiver in aid of executing a judgment for the mortgage debt before notice of the federal tax lien was recorded, thus obtaining possession of the liquor license and enjoying priority under Section 6323 of the Internal Revenue Code of 1954.

Internal Revenue Summons: Court Permitted Party Summoned to Depose Special Agent, but Limited Deposition to Questions Defined in United States v. Powell; Request for Jury Trial Denied. Edward F. Kennedy, Special Agent v. William Rubin (N.D. Ill., May 20, 1966) 66-2 USTC Par. 9603. A summons enforcement proceeding was initiated in order to compel respondent to turn over certain corporate records of the Morrison Hotel, and its successor, the Henning Hotel Corporation. Respondent noticed the Special Agent for deposition, and requested a trial by jury.

The Court held that this was a plenary proceeding, and thus subject to the Federal Rules of Civil Procedure. Accordingly, respondent was permitted to depose the Special Agent, but only within the limits prescribed in United States v. Powell, 379 U.S. 48 (1964). The discovery was thus limited to the following issues: 1) What is the chief purpose of the investigation? 2) Has a good faith determination been made that a second examination is necessary? 3) Does the Internal Revenue Service already have in its knowledge and possession the information it seeks? and 4) Was this investigative proceeding instituted to obtain evidence against respondent for use in a criminal prosecution?

Respondent's request for a jury trial was denied on the ground that this was an equitable proceeding, and thus, triable only by the Court.

The enforcement proceeding awaits a trial on the merits.

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

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