United States Attorneys Bulletin

Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.

VOL. 16 MARCH 15, 1968 NO. 6

UNITED STATES DEPARTMENT OF JUSTICE

Vol. 16 March 15, 1968 No. 6

TABLE OF CONTENTS

		Page
ANTITRUST DIVISION		
SHERMAN ACT		
Motion for "Protective Order" and Motion for Discovery and Inspection of Grand Jury Testimony of Non-Defendant Witnesses Denied	U. S. v. Pioneer Builders, Inc. (D. Md.)	183
Particularized Need Must Be Demonstrated Before Granting Production of Grand Jury Transcripts	U. S. v. United Concrete Pipe Corp. (N. D. Texas)	184
CLAYTON ACT.		
Merger Agreement Between Two Philadelphia Banks Held Unlawful and in Violation of § 7 of Clayton Act and Bank Merger Act of 1966	U. S. v. Provident Natl. Bank (E. D. Pa.)	185
CIVIL DIVISION		
FEDERAL TORT CLAIMS ACT - SCOPE OF EMPLOYMENT		
Army Recruiter Driving Government Vehicle Home From Work in Violation of Army Regulations Held Not Acting Within Scope of Employment	Guthrie v. U. S. (C. A. 7)	188
SOCIAL SECURITY ACT - DISABILITY BENEFITS		
Amendments to Act Changing Definition of Disability So as to Require Showing of Inability to Perform Any Work Existing in National Economy Held to Necessitate Remand of Pending Case for Further Administrative Proceedings	Daniel v. Gardner (C. A. 5)	188

		Page
CIVIL DIVISION (CONTD.)		
VETERANS AFFAIRS		
Mandamus Will Not Lie to Compel Secretary of Defense to Expand Burial Space in National Cemeteries	McCarey v. McNamara (C. A. 3)	189
CRIMINAL DIVISION		
FIREARMS		
Prosecutions Under § 5851 of National Firearms Act in Wake of Supreme Court's Decision in Haynes v. U.S.	Special Notice	190
FORFEITURES		
Notice of Forfeiture Proceedings	Special Notice	191
FOOD, DRUG AND COSMETIC ACT		
Article Used to Ligate Severed Blood Vessels "New Drug" Under 21 U. S. C. 321p	AMP, Inc. v. Gardner (C. A. 2)	192
MAIL FRAUD		
Testimony by Victims as to Misrepresentations Made by Salesmen of Defendants Admissible	Pritchard v. U. S. (C. A. 8)	193
EXECUTIVE OFFICE FOR U. S. ATTORNEYS		
New Appointments		200
LAND AND NATURAL RESOURCES DIVISION		
PUBLIC LANDS		
Railroad Land Grants; Assignment of Forest Lieu Selection Rights Not Enforceable Against U. S. as "Scrip Rights"; Interior's Administrative Construction of Statute Entitled to Deference	Udall v. Battle Mountain Co. (C. A. 9)	201

		Page
LAND AND NATURAL RESOURCES DIVISION (CONTD.)		
INDIANS		
Secretary of Interior's Administrative Authority to Cancel Lease of Restricted Indian-Owned Land After Approval by Subordinate of Secretary	Gray v. Johnson (C. A. 10)	201
INDIAN PROPERTY		
Survey: Boundary Location; Trial Procedure; Appointment of Expert Witness to Assist Trial Court; Reversal for Error Not Preserved	U. S. v. Cline (C. A. 4)	202
TAX DIVISION		
LIENS		
For Taxes Discharged in Bankruptcy Do Not Attach to After Acquired Property	In the Matter of Walter R. Braund, Virginia Braund, Bankrupts (C. D. Calif.)	205
FEDERAL RULES OF CRIMINAL PROCEDURE		
RULE 5: PROCEEDINGS BEFORE COMMISSIONER		
(a) Appearance Before Commissioner		
Exclusion of Fruits of Interrogation During Lawful State Custody Before Arraignment Not Required, Absent Federal-State Collusion	Barnett v. U. S. (C. A. 5)	207
RULE 7: THE INDICTMENT AND THE INFORMATION		
(f) Bill of Particulars		
Writ of Mandamus Granted--Without Opinion Justifying Issuance--to Compel District Court Judge to Vacate	Will, U. S. District Judge v. U. S. (Sup. Ct.)	209

		Page
FEDERAL RULES OF CRIMINAL PROCEDURE (CONTD.)		
RULE 7(f) - (Contd.)		
Portion of Pretrial Order Directing Furnishing Certain Particulars Vacated and Case Remanded		
RULE 16: DISCOVERY AND INSPECTION		
(b) Other Books, Papers, Documents, Tangible Objects or Places		
Motion Requesting Return of Seized Items Granted in Part, With Restrictions	U. S. v. Zovluck (S. D. N. Y.)	213
RULE 28: EXPERT WITNESSES AND INTERPRETERS		
(b) Interpreters		
Court's Failure to Appoint Not Abuse of Discretion or Prejudicial	U. S. v. Desist, et al. (C. A. 2)	215
RULE 41: SEARCH AND SEIZURE		
(e) Motion for Return of Property And To Suppress Evidence		
Appeal on Basis Evidence Seized Illegally Barred Where Timely Motion for Suppression Not Filed	U. S. v. Weldon (C. A. 2)	217
LEGISLATIVE NOTES		

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

DISTRICT COURT

SHERMAN ACT

MOTION FOR "PROTECTIVE ORDER" AND MOTION FOR DISCOVERY AND INSPECTION OF GRAND JURY TESTIMONY OF NON-DEFENDANT WITNESSES DENIED.

United States v. Pioneer Builders, Inc., et al. (D. Md., Cr. 27439; February 23, 1968; D.J. 60-12-127)

On Friday, February 23, 1968 Judge Alexander Harvey II dismissed a motion by the defendant Joseph B. Bahen, Jr. for a "protective order" suppressing all documents and all testimony which might be offered in connection with a proposed motion to dismiss the indictment on the basis of 15 U.S.C. 32. The Court ruled that such a motion was premature and predicated at best upon speculation and conjecture as to what evidence, if any, the defendant might offer in support of his motion to dismiss. The Court made it clear that counsel for the individual defendant in permitting the defendant to testify in furtherance of a pretrial motion must be governed by the same considerations as when permitting him to take the stand in his own defense at trial. The Court observed that it was doubtful that any such supporting evidence would be substantially different from that available from the record of the grand jury proceedings which were to be challenged by the motion to dismiss. Finally, the Court suggested that should the defendant prevail in his motion to dismiss by reason of immunity, the result would be dismissal of the indictment, as to the individual defendant, and not merely a suppression of the evidence.

On the same day, Judge Harvey denied a belated and supplemental motion by the defendant Pioneer Builders, Inc. and Bahen for discovery and inspection of the grand jury testimony of non-defendant witnesses, the documents produced by such non-defendant witnesses and the Government's trial exhibits under Rule 16(b). The Court noted that the Government had already agreed to make available copies of its trial exhibits to the defendants substantially prior to trial and had, pursuant to a previous order, delivered the documents produced by the co-defendant corporations to the office of the Clerk of the Court for examination by defense counsel. The Court recalled that it had already denied access to the grand jury testimony of non-defendant witnesses at an earlier hearing on a motion for discovery and inspection under Rule 16(a) and that clearly Rule 16(b) did not authorize such disclosure.

The Court took exception to the excessive number of pretrial motions filed on behalf of these defendants and gave the defendants only five days to perfect the motion to dismiss on behalf of the defendant Bahen.

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

PARTICULARIZED NEED MUST BE DEMONSTRATED BEFORE GRANTING PRODUCTION OF GRAND JURY TRANSCRIPTS.

United States v. United Concrete Pipe Corporation, et al. (N. D. Texas, Cr. 3-690; January 22, 1968; D. J. 60-16-67)

Following the entry by Judge Sarah T. Hughes of an order on September 16, 1966 requiring production of grand jury testimony of the officers and ex-officers (but not testimony of employees and managerial agents) of defendant corporations as a matter of right under Rule 16(a)(3) F. R. C. P., all parties sought writs of mandamus. On January 5, 1968 the Fifth Circuit rendered an opinion which, among other things, questioned whether mandamus was appropriate or available until such time as the parties sought from the trial court production on discretionary principles and the trial court refused to grant such relief.

On January 16, 1968, in the light of the Court of Appeals' observation, defendants filed additional motions for discovery and inspection under Rules 6(e) and 16(b) F. R. Cr. P. Arguments of the parties on these motions took place before Judge Hughes in Dallas, Texas on January 18, 1968. On January 22, 1968 Judge Hughes ordered that under Rule 6(e) there was a particularized need for production of the grand jury transcripts of the same officers and ex-officers of the defendant corporations and of two additional former officials (not corporate officers or ex-officers) of the defendant United Concrete Pipe Corporation. One of these was formerly the general manager of United's Texas operations who was alleged by the defendants to be hostile to them and the other was formerly United Concrete's Texas sales manager. Judge Hughes ruled that the defendants failed to demonstrate a particularized need as to other officials and employees of the corporate defendants and denied their motions as to these persons.

The defendants argued that the Court of Appeals in its January 5, 1968 opinion had in effect given its blessing to the order of Judge Cabot in the pending Sherman Act criminal action of United States v. Venn et al., and that Judge Hughes should grant the extremely full discovery granted there. The Government argued that this interpretation of the Court of Appeals' opinion was misplaced, and that the Court of Appeals had merely suggested a further hearing to determine in the Texas case whether there was a particularized need for production of the grand jury transcripts, and had not

suggested Judge Hughes adopt the Cabot type order. The Government during argument on January 18, 1968 stated that every official and employee of the defendant corporations who was called to testify before the grand jury was accompanied to the grand jury room door by an attorney or attorneys for the corporate defendants; that these attorneys remained in the corridor until the witnesses completed their testimony; and that these attorneys were observed conversing with the witnesses immediately after the witnesses completed their testimony.

The Government argued the hostility to the Government of the corporate officers and employees, including the named co-conspirators in the Government's bill of particulars. The Government further argued that in Dennis, the particularized need had been for impeachment at trial of 4 of 8 witnesses without whose testimony the Government could not have secured a conviction, while in the Texas case the defendants were seeking the transcripts of persons friendly to them and hostile to the Government.

Judge Hughes also dissolved that part of her September 16, 1966 order which precluded the defendants from making available to each other the grand jury transcripts and other documents each defendant was permitted to see. Judge Hughes in her January 22, 1968 order did not vacate her Rule 16(a)(3) rulings in her September 16, 1966 order that defendant corporations as a matter of right may see grand jury testimony of its officers and ex-officers but that they may not as to other employees.

The corporate defendants have filed further briefs with the Court of Appeals urging it to decide the mandamus petition and cross-petitions of the defendants on the Rule 16(a)(3) question.

Staff: Thomas S. Howard and William T. Huyck (Antitrust Division)

CLAYTON ACT

MERGER AGREEMENT BETWEEN TWO PHILADELPHIA BANKS HELD UNLAWFUL AND IN VIOLATION OF SECTION 7 OF CLAYTON ACT AND BANK MERGER ACT OF 1966.

United States v. Provident National Bank, et al. (E. D. Pa., Civ. 40032; February 12, 1968; D. J. 60-111-1003)

In a signal decision rendered in this case, Chief Judge Thomas J. Clary ruled as unlawful and in violation of Section 7 of the Clayton Act and the Bank Merger Act of 1966 (BMA 66) the merger agreement of Provident National Bank and Central-Penn National Bank of Philadelphia. Although he saw the merger as "good for the community" the Court was "constrained" in the face

of Supreme Court decisions, "albeit reluctantly, to declare that this merger may not be consummated." The case was filed and decided following passage of BMA 66.

The complaint was filed April 1, 1966 charging a violation of Section 7 of the Clayton Act. The District Court dismissed for failure to state a cause of action in that the complaint relied solely on Section 7 of the Clayton Act without making any mention of BMA 66, United States v. Provident National Bank, et al. 262 F. Supp. 397 (E. D. Pa. 1966). The Supreme Court reversed holding that failure to mention or to rely on BMA 66 was not vital to the pleading since the anticompetitive effects of bank mergers were still to be assessed by traditional antitrust criteria, United States v. First City National Bank of Houston, 386 U. S. 361 (1967). The new act, the Supreme Court held, merely created a new defense in bank cases, i. e., a bank merger could be justified if the "convenience and needs" of the community to be served "clearly out-weighed" anticompetitive effects, the burden of the defense being on the interested parties to plead and to prove. The case was then remanded to the District Court for trial.

Before coming to grips with the issues the Court in its opinion described the merging banks and the market in which they did business. Provident was described as the fifth largest bank in the four-county area of Bucks, Montgomery, Delaware and Philadelphia counties with assets of approximately $683,000,000 or 9% of the total assets of commercial banks doing business in the area. Provident had approximately 9% of the total loans, deposits, and banking offices of banks doing business in the area. Central-Penn was described as the seventh largest bank in the four-county area controlling approximately $369,000,000 or 5% of the total assets of commercial banks doing business in the area. Central-Penn had between 5% and 6% of the total loans, deposits, and banking offices of banks doing business in the area. The merger would have given Philadelphia its fifth billion dollar bank. The five largest banks in the area before the merger controlled approximately 73% of the assets, 74% of the loans, 71% of the IPC deposits and 57% of the banking offices in the area. After the merger the five largest banks would have controlled approximately 77. 7% of assets, 77. 8% of deposits, 78. 6% of loans, 63. 3% of the banking offices in the area.

The Court, in measuring anticompetitive effects of the merger adopted as the relevant geographic market, as urged by the Department, the four-county area of Bucks, Montgomery, Delaware and Philadelphia. The Court adopted as its product market, again as urged by the Department, "commercial banking," but enlarging the market in this instance to include mutual savings banks and savings and loan associations. The Court made the extension largely because of intensified competition for the savings dollar among commercial banks, the mutuals, and the savings and loan associations.

With geographic and product markets so defined, and making allowances for what the Court regarded as national market business, the Court found that the merged bank would control approximately 10% of the relevant market. Viewing the Philadelphia market as a market that could be unqualifiedly characterized "as one where there has been a long and continuous trend toward concentration" and terming Philadelphia as concededly an "oligopolistic banking structure" the Court concluded that "any merger which strengthens this oligopolistic merger must be struck down." Thus even though the merging banks' share of the market would be substantially less than the 30% found objectionable in United States v. Philadelphia National Bank, 374 U.S. 321 (1963), the Court found that in line with decisions from United States v. Continental Can, 378 U.S. 441 (1964), on down to United States v. Von's Grocery, 384 U.S. 270 (1966), the merger had to be declared anticompetitive.

Having determined that the merger would be anticompetitive, the Court passed to whether the defense of "convenience and needs" had been sustained. The Court gave a limited interpretation to "convenience and needs." It saw "convenience and needs" as addressing itself to a floundering bank situation or to providing a community with a needed larger bank, but refused to espouse the broad public interest "convenience and needs" approach of Crocker-Anglo, United States v. Crocker-Anglo National Bank. It recognized the "convenience and needs" defense as one sustainable "in only a very few instances."

The Court rejected the banks' argument of "convenience and needs" based on claims that the merger would assist Philadelphia resolve its economic problems. It saw the argument as tenuous. It failed to see the link between Philadelphia's economic problems and the banks. It failed to see the relationship between those problems and an additional billion dollar bank in the area. At best, the Court saw the banks as having made a persuasive "but not a compelling" showing of "convenience and needs," in which case the result was a tie, and in line with the "clearly out-weighed" concept of the "convenience and needs" defense, the banks had failed to sustain their burden.

The Comptroller of the Currency, who had approved the merger, was a party to the proceedings as intervenor as provided in BMA 66, joining with the banks to sustain the merger.

Staff: John W. Neville, Arthur I. Cantor, John W. Clark, Stephen A. Aronow and Frank Taylor (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURT OF APPEALS

FEDERAL TORT CLAIMS ACT - SCOPE OF EMPLOYMENT

ARMY RECRUITER DRIVING GOVERNMENT VEHICLE HOME FROM WORK IN VIOLATION OF ARMY REGULATIONS HELD NOT ACTING WITHIN SCOPE OF EMPLOYMENT.

Guthrie v. United States (C. A. 7, No. 16,138; February 9, 1968; D. J. 157-85-91)

Plaintiff brought this Federal Tort Claims Act suit for the wrongful death of his wife alleged to have been caused by the negligent driving of a Government vehicle by an Army recruiter. At the time of the accident, the serviceman was en route to his home. The district court dismissed the suit, holding that the recruiter was not acting within the scope of his employment at the time of the accident.

In affirming the dismissal, the Court of Appeals noted that although under the applicable Wisconsin law the driving by one person of an automobile which is owned by another raises a presumption of agency, the evidence rebutted that presumption. The Court found there was no evidence the recruiter had any recruiting appointments in the area in which he was traveling and that the recruiter's use of the Government vehicle to drive himself home violated Army regulations.

Staff: Jack H. Weiner (Civil Division)

SOCIAL SECURITY ACT - DISABILITY BENEFITS

AMENDMENTS TO ACT CHANGING DEFINITION OF DISABILITY SO AS TO REQUIRE SHOWING OF INABILITY TO PERFORM ANY WORK EXISTING IN NATIONAL ECONOMY HELD TO NECESSITATE REMAND OF PENDING CASE FOR FURTHER ADMINISTRATIVE PROCEEDINGS.

Bernice P. Daniel v. Gardner (C. A. 5, No. 24, 527; February 8, 1968; D. J. 137-1-464)

Amendments to the Social Security Act, 81 Stat. 821, enacted on January 2, 1968 and made applicable to cases pending in the courts when "the decision in such civil action has not become final" before January 1968, provide that a person may be considered disabled only if his "impairments are

of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work". The amendments go on to define "work which exists in the national economy" to mean "work which exists in significant numbers either in the region where such individual lives or in several regions of the country."

Prior to these amendments, the Fifth Circuit had ruled in effect, that a claimant was entitled to disability benefits if there was no suitable job available in his geographic area. Bridges v. Gardner, 368 F. 2d 86, 91. Recognizing that its Bridges decision has now been superseded by the new "national economy" test, the Court of Appeals in the present case remanded the case for further proceedings in light of the new amendatory provisions.

Staff: United States Attorney Macon L. Weaver; Assistant United States Attorney John R. Thomas, Jr. (N. D. Ala.)

VETERANS AFFAIRS

MANDAMUS WILL NOT LIE TO COMPEL SECRETARY OF DEFENSE TO EXPAND BURIAL SPACE IN NATIONAL CEMETERIES.

John F. McCarey, et al. v. Robert McNamara, et al. (C. A. 3, Nos. 16, 701 and 16, 702; February 14, 1968; D. J. 145-15-103)

The widow of a deceased war veteran and the commander of a veterans organization brought suit in the nature of mandamus to compel the Secretary of Defense to enlarge national cemeteries in the Philadelphia area, so as to make it possible to provide veterans in that area with burial plots near their homes. The district court granted the Secretary's motion to dismiss.

The Court of Appeals affirmed per curiam. The Court first noted that there were no funds appropriated by Congress expressly for cemetery expansion. It then held that the choice of how, if at all, to spend available funds which were not specifically allocated for cemetery expansion purposes involved "judgment which the administrative authorities are more competent to make than are courts and with which courts should not and do not interfere."

Staff: Robert V. Zener and Daniel Joseph (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

SPECIAL NOTICES

FIREARMS

PROSECUTIONS UNDER SECTION 5851 OF THE NATIONAL FIREARMS ACT IN THE WAKE OF THE SUPREME COURT'S DECISION IN HAYNES V. UNITED STATES

Pending matters previously investigated as involving possession of an unregistered firearm in violation of 26 U. S. C. 5851 should be converted, where possible, into cases relating to possession of a firearm made, or transferred, in violation of the same section of the Act. Pending indictments charging possession of an unregistered firearm should, where possible, be superseded by indictments charging possession of a firearm made or transferred, as the case may be, in violation of the Act. The Alcohol and Tobacco Tax Division has indicated that perhaps half of such pending cases can be so converted, although additional investigation may be necessary.

Pending cases which have been prepared with a view to charging possession of an unregistered firearm and which for lack of evidence cannot be converted into cases charging possession of an illegally made or transferred firearm, should be abandoned. The Criminal Division will authorize dismissal of such cases if charges have already been filed, but the Form 900 request for authorization to dismiss should be submitted as usual. If a case involving possession of an unregistered firearm is pending before a circuit court of appeals, the United States Attorney should file a petition with the appellate court seeking remand to the district court for proceedings consistent with the Supreme Court's opinion in Haynes v. United States (No. 236, January 29, 1968, D. J. No. 80-73-18). Where a case may be converted to a charge of possessing an illegally made or transferred firearm, defense counsel should be informed that the Government will not oppose a motion to the district court to dismiss. In such cases, every effort should be made to reindict if the statute of limitations permits. See Waters v. United States, 328 F. 2d 739 (10th Cir., 1964). Where it is not possible to convert a case, the case should be dismissed either on the motion of the defense, or by the Government after receipt of authorization from the Criminal Division.

The Haynes opinion held that a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions

either for failure to register a firearm under 26 U. S. C. 5841 or for possession of an unregistered firearm under 26 U. S. C. 5851. Where a case falling into either one of these categories was pending before appellate courts at the time the Haynes case was decided (Jan. 29, 1968), we feel that even though the defendant may have failed to claim the privilege, the Government should concede that he would have done so had he known that a proper claim of the privilege constituted a full defense to the charges against him. In short, we think that the Government should concede that the defendant made no knowing waiver of his privilege in the foregoing situation.

With respect to post-conviction motions by defendants convicted of possessing an unregistered firearm, the issue of whether the rationale of the Haynes case may be applied retroactively, has yet to be resolved.

Attached to this issue of the U. S. Attorneys' Bulletin is an "Analysis of the Effect of the Haynes Decision Upon Prosecution Under the National Firearms Act".

FORFEITURE

NOTICE OF FORFEITURE PROCEEDINGS

Rule C(4) of the Civil Supplemental Rules, Admiralty and Maritime Claims, provides for Notice by Publication in any in rem action. No other notice is required. The provisions of the Rule are applicable in forfeiture cases under the Internal Revenue, Narcotics, and Customs laws. The Department recently encountered difficulty in several cases in which default judgments of forfeiture obtained in such cases have been vacated because of lack of personal service or service by mail upon known claimants or persons known to have had an interest in property subject to judicial forfeiture proceedings. United States Attorneys should see to it that their staffs make sure that in all cases involving forfeiture actions under the above laws any person known to have an interest in such property is also served with copies of the complaint, the warrant for arrest of the property, and notice of the pendency of the action. Such notice should set forth the time in which any claimant must file his claim and answer as set forth in subdivision (6) of the Rule. This should be done personally if expedient, or by certified mail, return receipt requested, addressed to the last known address of such person.

COURTS OF APPEAL

FEDERAL FOOD, DRUG, AND COSMETIC ACT

ARTICLE USED TO LIGATE SEVERED BLOOD VESSELS HELD "NEW DRUG" UNDER 21 U. S. C. 321p.

AMP Incorporated v. Gardner and Goddard (C. A. 2, February 13, 1968; D. J. 21-51-544)

In the Bulletin for November 10, 1967, we reported the District Court opinion (Tenney, J.; S. D. N. Y.) upholding the Government's contention in the above-captioned case. The Court of Appeals has affirmed the summary judgment which held that appellant's products are "new drugs" within the meaning of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. 301 et seq. Appellant's products consist of a disposable applicator, a nylon ligature loop, and a nylon locking disk. The applicator is used to ligate severed blood vessels during surgery, which is accomplished by placing the loop over the severed vessel, tightening the loop, and locking it in place with the disk. It constitutes a new method of tying off blood vessels, the present method being a hand-tied surgeon's knot.

The Court held that although the Act's definitions of "drug" and "device" are parallel, except for the use of "instruments, apparatus, and contrivances," rather than the broader word "articles" in defining "device", the purpose of the statutory provision is the best test of its meaning. Analysis of the legislative history led the court to conclude that the legislative purpose was clearly to keep inadequately tested medical and related products, which might cause widespread danger to human life, out of interstate commerce, and therefore a narrow construction was to be avoided.

Since the sutures involved consisted of a material of the type recognized in the United States Pharmacopoeia and which had always been regarded as "drugs" by the Food and Drug Administration, and since Section 201(g) of the Act plainly permits such a determination, the Court was of the opinion that the articles were properly classified as drugs. Inasmuch as the products and the method were not presently, and never had been, generally recognized as safe and effective among qualified experts for use in ligating bleeding vessels, the Court concluded the products were "new drugs" and subject to the statutory provisions requiring submission of proof of safety and efficacy to the Commissioner of Food and Drugs prior to marketing.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorneys James G. Greilsheimer and Martin Paul Solomon (S. D. N. Y.) [On the brief was Attorney Paul Hyman, Food and Drug Administration]

MAIL FRAUD

TESTIMONY BY VICTIMS AS TO MISREPRESENTATIONS MADE BY SALESMEN OF DEFENDANTS ADMISSIBLE.

Pritchard v. United States (C.A. 8, 1967, 386 F. 2d 760; D.J. 36-42-57)

Appellant Pritchard and others were convicted on charges of violations of the mail fraud statute, 18 U.S.C. 1341, in a scheme and artifice to defraud prospective purchasers of franchises to sell paint products. On appeal, the defendant charged as error the admission by the trial court of testimony by the victims named in the indictment with respect to the representations of salesmen of defendant, which salesmen were not named as defendants.

Noting that such testimony is hearsay, and therefore inadmissible unless it falls within an exception to the hearsay rule, the Court pointed out that the general rule permits the admission of such statements, if they have been expressly or impliedly authorized, or have been ratified by the person against whom they are offered, citing Beck v. United States, 305 F. 2d 595, 600, and cases cited therein. Finding that there was adequate circumstantial evidence to support a finding that these statements had been authorized or ratified by defendant, the Circuit Court affirmed the judgment of conviction.

Staff: United States Attorney Veryl L. Riddle; Assistant United States Attorney Stephen H. Gilmore (E.D. Missouri)

ANALYSIS OF THE EFFECT OF THE HAYNES DECISION UPON PROSECUTIONS UNDER THE NATIONAL FIREARMS ACT

On January 29, 1968, the Supreme Court handed down three decisions involving the application of the constitutional privilege against self-incrimination to prosecutions for violation of certain regulatory tax statutes. Two of these cases, Marchetti v. United States, 36 L.W. 4143, and Grosso v. United States, 36 L.W. 4150, dealt with the registration provisions of the Wagering Tax Act. The third, Haynes v. United States, 36 L.W. 4164, involved the registration provisions of the National Firearms Act, 26 U.S.C. 5801, et seq. In each case, the Court held that an accused could assert his Fifth Amendment privilege in bar of a prosecution based upon the accused's failure to provide the Government with information required incident to the exercise of the taxing power. The specific holding in Haynes was "that a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm under Section 5841 or for possession of an unregistered firearm under Section 5851 [of the National Firearms Act]."

The National Firearms Act was designed to control so-called gangster type firearms - machine guns, short-barreled rifles and shotguns and gadget-type firearms - through the use of the federal taxing power. It imposes an occupational tax on engaging in business as a manufacturer, importer or dealer in such firearms (26 U. S. C. 5801). An excise tax is levied on the making or transfer of a firearm, and certain exceptions to these taxes are included in the Act (26 U. S. C. 5821, 5811, and 5812). A firearm which has not been lawfully made or transferred is required to be registered (26 U.S.C. 5841). Transferors and makers of firearms are also required to file certain information with the Treasury Department (26 U. S. C. 5814 and 5821(e)), in a procedure equivalent to registration. Section 5851 makes it unlawful to receive or possess any firearm which has at any time been unlawfully transferred or made and which has not been registered pursuant to 26 U.S.C. 5841. Criminal sanctions for violation of any of the Act's requirements are set out in Section 5861.

Prior to the Haynes case, the Ninth Circuit Court of Appeals had held that 26 U. S. C. 5841, by requiring registration of an otherwise unlawfully held firearm, constituted an unconstitutional infringement of the Fifth Amendment privilege against self-incrimination. Russell v. United States, 306 F. 2d 402 (9th Cir., 1962). The defect in the statute was that by registering a firearm which had been unlawfully made or transferred, a person would be providing the Government with evidence that he had violated some other section of the Act (e. g., the transfer or making clauses of 26 U. S. C. 5851). Subsequent to Russell, several circuit courts upheld convictions under Section 5851 for possession of a firearm which had never been registered by anyone (Frye v. United States, 315 F. 2d 491 (9th Cir., 1963); Starks v. United States, 316 F. 2d 45 (9th Cir., 1963)) while striking down prosecutions under Section 5851 charging possession by an accused of a firearm which he had not registered (Lovelace v. United States, 357 F. 2d 306, 309 (C. A. 5, 1966)). The rationale of these cases was that the privilege against self-incrimination has no proper application in a case involving possession of a firearm which had not been registered by anyone, since registration by the accused would not necessarily have indicated that the failure to register was chargeable to him. The court was thereby taking cognizance of the possibility that the failure to register might have been chargeable to and, therefore, only incriminating to a prior possessor.

In the Haynes case, the Government attempted to rely on this distinction. Haynes was prosecuted under Section 5851 for possessing a firearm which had not been registered pursuant to the requirements of Section 5841. The Government argued that compliance with Section 5851 would not infringe the defendant's privilege against self-incrimination in the same way as did Section 5851 because the two statutes were directed at different situations. Section 5841 required registration of any firearm which the defendant had

either unlawfully made or unlawfully received. Compliance would, therefore, necessarily be incriminating. However, according to the Government, Section 5851 was also intended to reach those who had failed to register a firearm which was in their possession and which had been unlawfully made or transferred by some prior possessor. The court was not convinced. It found that a charge under Section 5851 that a person possessed a firearm which had not been registered is legally indistinguishable from a charge under Section 5841 that the accused had failed to register possession of a firearm. The Court went on to hold that the obligation to register under Section 5841 would have compelled the accused to provide self-incriminating information, and that a proper claim of privilege should provide a full defense to prosecutions under either Section 5841 or 5851.

In Haynes, the Supreme Court primarily concerned itself with the threat of incrimination under federal law. However, the Court also observed that a registrant "might be confronted by hazards or prosecution under state law, and that these hazards might support a proper claim of privilege." This proposition was at the heart of the Court's decision in Grosso v. United States, supra. In Marchetti, the Court concluded that a substantial risk of incrimination as to prospective acts would also justify a proper claim of Fifth Amendment privilege. We may assume, therefore, that incriminating material divulged in the filing of an application to transfer a firearm or in the filing of a declaration of intent to make a firearm, under the National Firearms Act, can give rise to a proper assertion of privilege even if the danger of self-incrimination is a prospective one. However, Marchetti also points out that "insubstantial claims of the privilege as to entirely prospective acts . . . need only be considered when a litigant has the temerity to pursue them." One of the factors which may have prompted the Court to extend the Fifth Amendment privilege to information which is only prospectively incriminating is the existence of 26 U. S. C. 6107. Section 6107 requires the disclosure and dissemination to state and local authorities of information obtained during the collection of certain special taxes including the wagering tax. It is relevant, in this analysis of the effects of the Haynes decision, to note that while Section 6107 is applicable to the special occupational tax imposed by 26 U. S. C. 5801, it does not extend to the making and transfer tax provisions of the National Firearms Act (26 U. S. C. 5814 and 5821(e)).

It is against the foregoing background that we must try to assess the impact of the Haynes case on future prosecutions under the National Firearms Act. Clearly, prosecutions under that portion of Section 5851 which makes it unlawful to possess a firearm which has not been registered under Section 5841 and prosecutions for violation of Section 5841 itself, can no longer be maintained with any hope of success unless the defendant has in some way waived his privilege against self-incrimination. However, since

the Supreme Court did not find Section 5851 or any other portion of the National Firearms Act to be unconstitutional, the remaining provisions of Section 5851 appear to retain their vitality.

In addition to prohibiting the possession of any firearm not registered in accordance with Section 5841, Section 5851 also makes it unlawful to possess a firearm which at any time has been made in violation of Section 5821 or transferred in violation of Sections 5811, 5812(b), 5813, 5814, 5844 or 5846. Of immediate concern in the light of Haynes are the informational requirements created by Sections 5821(e) and 5814, and their application to the possession statute.

Section 5814 makes it "unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued . . . for that purpose by the Secretary . . . . Such order shall identify the applicant by such means of identification as may be prescribed by regulations . . . ." 26 C. F. R. 179. 98 et. seq., provides that the transferee must attach a picture of himself taken within the last year and must affix his fingerprints to the application papers. The transferee's application "must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal, or . . . other person . . . acceptable to the Director, . . . certifying that he is satisfied that the fingerprints and photograph appearing on the application are those of the applicant and that the firearm is intended for lawful purposes." Section 5814 charges the transferor with the responsibility for filing the application required by the statutes. The liability of the transferee is limited under Section 5811(b) to payment of the transfer tax in the event that the transferor does not pay it.

The making provisions of Section 5821(e) are somewhat analagous to the transfer provision just discussed. Section 5821(e) makes it unlawful for any person subject to the tax on the making of firearms "to make a firearm unless prior to such making, he has declared in writing his intention to make a firearm . . . and has filed [such declaration] . . . . The declaration . . . shall be filed at such place, and shall be in such form and contain such information, as the Secretary . . . may by regulations prescribe . . . . If the person making the declaration is an individual there shall be included as part of the declaration the fingerprints and a photograph of such individual." A certification by a designated law enforcement official is also required of makers. See 26 C. F. R. 179. 77 - 179. 79. This certificate affirms that the firearm is intended to be used for lawful purposes.

Several types of prosecutive situations commonly arise under the transfer and making provisions of 26 U. S. C. 5851. We believe that these

are not subject to the infirmity present in Haynes:

1. An accused may receive or be in possession of a weapon which was illegally made by another person. The accused would have neither standing nor occasion to invoke his privilege against self-incrimination in such a case since his offense derives not from his own failure to comply with the making provisions but rather from his receipt or possession of a firearm illegally made by others.

2. An accused may be in possession of a firearm which he received in an unlawful transfer. As a transferee, the accused had no duty to file an application for transfer (this being the obligation of the transferor). However, the transferee was required to give information in the application, e. g., name, address, photograph and fingerprints. The latter two items must have been verified by a law enforcement official. A transferee complying with the application requirement would not have subjected himself to self-incrimination for a violation of federal law, since no federal offense could have been committed until the transfer was completed and the transfer could not legally have been made until the application had been approved by the Treasury Department. If the prospective transfer were illegal it would not have been approved.

By the same token, filing of the application required by Section 5814 would appear to present no substantial hazard of incrimination under state law. Under the applicable regulations, the transferee's portion of the application for transfer must be verified by local police and an appropriate local official must certify that the prospective transferee's intended use of the firearm is for lawful purposes 26 C. F. R. 179. 99. If any state or local law would be violated by the transferee's receipt or possession, the prospective transferee would probably be so advised prior to the transfer of the weapon, at which time no offense would have been committed. Even if the applicant were not given notification at the state level that a transfer of possession to him would constitute a violation of state law, he would receive such notification from the Treasury Department and as a matter of policy the Treasury Department would refuse to approve the transfer.

3. An accused may be in possession of a firearm which he has made illegally, i. e., without filing a declaration of intention to make a firearm as required by Section 5821(e) and 26 C. F. R. 179. 77 - 179. 79. At the time he was required to file his declaration, such a defendant was in much the same situation as a prospective transferee, because at the time for filing the firearm was not yet in existence and the information required by the declaration would not have incriminated the accused as to any past or concurrent offense. Moreover, if the planned making would prospectively violate federal or state law, the declarant would be so informed, either by

local police or by the Treasury Department, prior to the making, at which time no offense would have yet been committed. In this connection, it should be noted that 26 C. F. R. 179. 79 requires a declarant to obtain the approval of the Director, Alcohol and Tobacco Tax Division, prior to making the firearm. As a matter of policy, the Director will not grant such approval where the making would constitute a violation of federal, state or local law.

The issue of whether the required filing of a declaration of intention to make infringes upon the constitutional privilege against self-incrimination was raised in United States v. Mares, 319 F. 2d 71 (C.A. 10, 1963). In that case a defendant was convicted of one count charging possession of a sawed-off shotgun which he had not registered pursuant to Section 5841 and of a second count charging possession of a firearm made in violation of Section 5821. On appeal, the Tenth Circuit set aside the conviction on count one because Mares had raised a proper claim of privilege under the Fifth Amendment. As to the remaining count, the court said at page 73:

> The declaration requirement contained in 26 U. S. C. 5821(e) does not violate the constitutional safeguard against self-incrimination in respect to prosecution for possession of firearms illegally made. * * * Section 5821 requires one who desires to make a firearm to file a declaration of intent with the Secretary of the Treasury and to pay the prescribed tax. In contrast with Section 5841, there is no self-incrimination inhering in the filing of the latter declaration or the payment of the tax. The declaration and payment required by Section 5821 would establish the legality, rather than the illegality, of the possession of such a firearm.

While the Haynes decision will probably have little impact upon the first two provisions of Section 5851, it may have a substantial impact upon prosecutions against transferors who have failed to comply with Section 5814. A transferor who came into possession of a firearm in an unlawful transfer would necessarily incriminate himself if he filed an application to transfer as required by Section 5814. He might also incriminate himself under some state laws prohibiting possession of the sort of firearms covered by the National Firearms Act.

Filings by transferors who took possession in a lawful transfer present no risk of self-incrimination under federal law. There may, however, be a possibility of self-incrimination with respect to state law. This could occur, for example, where a transferor has obtained a firearm in a lawful transfer and then moved to a state which requires all possessors of firearms to obtain licenses. If the transferor had failed to obtain such a

license, he might incriminate himself if he subsequently filed an application to transfer and the information in that application came to the attention of state authorities. It should be remembered in considering such situations that information obtained by the Treasury in connection with a firearm transfer is not required to be disclosed under 26 U. S. C. 6107. However, the Treasury will disclose such information on request.

The foregoing discussion considers several common situations which arise in prosecutions under the National Firearms Act. Obviously there are other possible variants which have not been dealt with. It is, therefore, important that United States Attorneys' offices carefully evaluate the possibilities for successful assertions of the privilege against self-incrimination, prior to bringing prosecutions under the National Firearms Act. If the Criminal Division can be of assistance in this regard, we hope that you will contact us.

* * *

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern, III

APPOINTMENTS

California, Central - ARNOLD G. REGARDIE; Hastings College of Law, LL. B., and formerly in private practice.

California, Southern - RAYMOND F. ZVETINA: Harvard Law School, LL. B., and formerly an Assistant United States Attorney and in private practice.

Colorado - WARWICK M. DOWNING, II; University of Denver Law School, LL. B., and formerly a Deputy County Counsel, a Deputy District Attorney, and in private practive.

District of Columbia - OLIVER A. HOUCK; Georgetown Law Center, J. D., and formerly a law clerk in the Court of General Sessions.

District of Columbia - DAVID T. AUSTERN; Yale Law School, LL. B., and formerly an Assistant District Attorney.

District of Columbia - HENRY F. GREENE; Columbia Law School, LL. B., and formerly a law clerk to a federal judge.

District of Columbia - AXEL-FELIX KLEIBOEMER; University of Chicago Law School, J. D., and formerly with the Government and in private practice.

Missouri, Eastern - JAMES M. GORDON; Washington University Law School, J. D., and formerly with a private law firm.

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

COURT OF APPEALS

PUBLIC LANDS

RAILROAD LAND GRANTS; ASSIGNMENT OF FOREST LIEU SELECTION RIGHTS NOT ENFORCEABLE AGAINST UNITED STATES AS "SCRIP RIGHTS"; INTERIOR'S ADMINISTRATIVE CONSTRUCTION OF STATUTE ENTITLED TO DEFERENCE.

Udall, Secretary of the Interior v. Battle Mountain Company (C. A. 9, 1967, 385 F. 2d 90, D. J. 90-1-4-103)

This was a proceeding to review a decision of the Secretary of the Interior rejecting the right to Battle Mountain to select public lands in lieu of forest lands relinquished to the United States by the Santa Fe Pacific Railroad in 1908. Battle Mountain claimed its forest lieu selection rights through 1915 assignments from Santa Fe. The administrative decision rejected Battle Mountain's claim on the ground that forest lieu selection rights were not assignable and, as to Battle Mountain, had been extinguished when the Government in 1957 reconveyed to Santa Fe the forest lands previously relinquished. The district court reversed the Secretary's decision, holding that the 1915 assignments were valid rights to select public lands regardless of the subsequent reconveyance.

On appeal by the Secretary of the Interior, the Ninth Circuit reversed. The Court of Appeals held that the position of the Department of the Interior had been clear since the passage of the Act of June 4, 1897, 30 Stat. 36, that the right of selection ran to the settlor or owner of the relinquished lands, and that these rights did not constitute assignable scrip. The Ninth Circuit regarded this as a reasonable construction of the 1897 Act, and therefore one to which the courts must defer. Battle Mountain's petition for certiorari is now pending in the Supreme Court.

Staff: A. Donald Mileur (Land and Natural Resources Division)

INDIANS

SECRETARY OF INTERIOR'S ADMINISTRATIVE AUTHORITY TO CANCEL LEASE OF RESTRICTED INDIAN-OWNED LAND AFTER APPROVAL BY SUBORDINATE OF SECRETARY.

Jack J. Gray v. Howard F. Johnson, et. al. (C. A. 10, No. 9627, February 8, 1968, D. J. 90-2-4-93)

Appellant Gray held a 10-year combination dry farming and grazing lease on 400 acres of land belonging to William Fletcher, a full-blood restricted Osage Indian. This lease was approved by the Superintendent of the Osage Agency, but cancelled by the Area Director of the Bureau of Indian Affairs because it was "against the best interests of the Indian." Officials of the Osage Agency knew of the interest of another party in obtaining a lease on the Fletcher land and took no steps to provide for competitive bids. The Area Director also found that the lease violated 25 C.F.R. 131.8(c) limiting dry farming leases to five years. The decision of the Area Director was affirmed by the Secretary of the Interior with the additional ground that the lease was also void because it did not contain a provision for periodic five-year review, as required by 25 C.F.R. 131.8. The District Court affirmed.

The Court of Appeals (Chief Judge Murrah dissenting) upheld the Secretary. The Court held that the Area Director's cancellation of the lease was allowed by 25 C.F.R. 2.14, making approval of the lease by a subordinate of the Secretary subject to a continuing right of appeal if the approval of such a lease results in injustice to an Indian. The Court distinguished cases that held that "once the United States, acting through an administrative agency, has granted unqualifiedly an interest in land, that grant may not be rescinded," on the ground that these cases do not relate to a "regulation such as 25 C.F.R. §2.14." The Court also upheld, as reasonable, the Secretary's interpretation of 25 C.F.R. 131.8(c) applying the five-year limitation on dry farming leases to combination dry farming and grazing leases, rather than the 10-year limitation on grazing leases. However, the Court rejected the Secretary's position that the provision for periodic review required by 25 C.F.R. 131.8 must be included in the lease. The Court noted that the lease stated that it is made "under and in accordance with the existing laws and regulations prescribed by the Secretary of the Interior, *** which by reference are made a part hereof." The Court held, "The effect of this provision is to make the regulations a part of the lease by agreement of the parties."

Staff: Frank B. Friedman (Land and Natural Resources Division)

INDIAN PROPERTY

SURVEY: BOUNDARY LOCATION; TRIAL PROCEDURE; APPOINTMENT OF EXPERT WITNESS TO ASSIST TRIAL COURT; REVERSAL FOR ERROR NOT PRESERVED.

United States v. Fred Cline, et ux. (C.A. 4, No. 11,559, January 8, 1968, D.J. 90-2-10-30-80)

In 1924, the Cherokee Indians of North Carolina sold a portion of their reservation along the Oconalufty River to the Town of Bryson City as a site for

a pond which would be formed by a dam of a stated height. This action in ejectment was brought by the United States as trustee for the Cherokees, against the Clines because they had built and occupied a house, motel and other buildings, without permission, on the Cherokee Reservation. The Clines defended on the ground that their improvements were located within the area which the Cherokees had conveyed to Bryson City. The dam had never been constructed to the full height envisaged in the 1924 deed.

After two trials and two appeals to the Forth Circuit, the sole issue remaining was where the 1,837.41 contour above m.s.l. would have been on the ground in 1924. This, under the trial court findings, was where the boundary of the pond would have been if the proposed dam had been built in 1924. To determine where this contour line lay on the ground, the district court appointed a surveyor as a "special master." The special master studied the prior evidence and findings, made a survey on the ground, and heard the testimony of the Clines' surveyor. Thereafter, he installed markers on the ground and made his report to the trial court. The trial court affirmed the report after hearing the exceptions which the Clines made.

On appeal, the judgment was vacated and the case remanded. For the first time on appeal, Cline complained that the special master was, in effect, an expert witness appointed by the court, and that Cline was never given an opportunity to cross-examine him. The Court of Appeals stated in its opinion:

> Had the appellants explicitly advised the District Judge of the apprehended conflict in the functions of the master, doubtlessly he would have at once recognized and salved their anxiety. The point was not made in the exceptions but it was urged, although lamely, in the hearing on them. Despite this fault in the procedure they pursued, we think the Clines ought to be allowed to press the master upon his findings and conclusions. * * *
>
> To remove any possible harm to the Clines by reason of the misunderstanding of the master's status, we will vacate the decree putting in effect the boundary line as laid out in his report. ***

It should be noted that the Fourth Circuit approved of the procedure of the trial court appointing an expert witness to assist him in the case, stating:

> Actually, the master was selected by the Court, quite advisably and altogether permissibly, as an expert to execute the Court's definition of the line, rather than as one to perform the duties of

a master as the law commonly knows that office. Thus he was subject to questioning by either party.

Staff: A. Donald Mileur (Land and Natural Resourses Division)

* * *

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT - CIVIL CASE

TAX LIENS - BANKRUPTCY

LIENS FOR TAXES DISCHARGED IN BANKRUPTCY ON GROUND THAT THEY BECAME LEGALLY DUE AND OWING MORE THAN THREE YEARS PRIOR TO BANKRUPTY DO NOT ATTACH TO PROPERTY ACQUIRED BY BANKRUPT AFTER ADJUDICATION AND DISCHARGE.

In the Matter of Walter R. Braund, Virginia Braund, Bankrupts. (C. D. Cal., in Bankruptcy Nos. 986-IH, 987-IH; January 8, 1968; D. J. File 5-12C-70) (68-1 U. S. T. C., par. 9201)

This is a bankruptcy proceeding in which the Government filed a proof of claim for federal income taxes in the amount of some $600,000 due and owing by the bankrupts (husband and wife) for periods more than three years prior to their adjudication as bankrupts. Notices of liens for those taxes were properly filed prior to bankruptcy. The issue presented to the Referee was whether or not a discharge in bankruptcy releases a bankrupt from his debts to the Government for unpaid income taxes which were assessed more than three years preceding bankruptcy where valid notices of liens for those taxes were filed prior to bankruptcy. The Government contended that a discharge in bankruptcy does not affect or release any tax lien, i. e. a lien, notice of which was filed prior to bankruptcy, and that the continued existence of that lien would permit the Government to distrain or foreclose the tax on after-acquired assets. The Trustee contended, and the Referee held, that under the general rule set forth in Section 17a(1) of the Bankruptcy Act, as amended by Section 2 of P. L. 89-496, the federal tax claims filed in this case were discharged because they were due and owing for periods of time more than three years prior to bankruptcy. The Referee held further that the tax liens, notices of which had been filed by the Government, were valid and that they attached to whatever property the bankrupt had subject to such liens at the time of bankruptcy, but that when the security therefor had been exhausted, no deficiency could be pursued or maintained against any property acquired after adjudication and discharge.

In reaching this conclusion, the Referee noted that under the Bankruptcy Act amendment involved, and for the first time in American bankruptcy history, taxes, whether federal, state or local, are dischargeable provided they became legally due and owing three years or more prior to the filing of a petition in bankruptcy, with five exceptions not pertinent to this proceeding. Observing that the case was one of first impression, the Referee

examined at length the legislative history of the amendment involved and made reference to the bankruptcy laws of other countries.

The Government is considering filing a petition for review by the District Court.

Staff: United States Attorney Wm. Matthew Byrne, Jr.; Assistant United States Attorneys Loyal E. Keir and Richard L. Fishman (C. D. Cal.); and George W. Shaffer, Jr. (Tax Division)

* * *