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TABLE OF CONTENTS

NEWS NOTES

ASSISTANT U.S. ATTORNEY FREEMAN IN S.D. IOWA RECEIVES LETTER OF COMMENDATION

March 5, 1969: Claude Freeman, Jr., Assistant United States Attorney in the Southern District of Iowa, has received a letter of commendation from Glen Taylor, Acting Assistant Attorney General of the Land and Natural Resources Division, for his work in connection with activities surrounding land condemnations for a federal dam project. The recommendation was made by the Director of Real Estate of the Office of the Chief of Engineers of the Department of the Army.

ANTITRUST DIVISION HEAD EXPRESSES CONCERN OVER SPIRALING "MERGER MANIA"

March 6, 1969: Richard McLaren, Assistant Attorney General for the Antitrust Division, said that his Division will closely scrutinize proposed conglomerate mergers. In remarks before the National Industrial Conference Board at the Waldorf-Astoria in New York City Mr. McLaren said, "I have expressed serious concern over the severe human and economic dislocations which are resulting from the current tax-propelled merger mania. I do not think we know at this time whether or not the Celler-Kefauver Act will reach so-called "pure" conglomerate mergers. But I believe we can and should go after some big-company mergers of a somewhat "purer" conglomerate nature than have been ruled on by the Supreme Court thus far. In my view many such mergers have a dangerous potential for substantially lessening competition--in a variety of ways--as well as for unduly increasing concentration. You can expect that we at the Antitrust Division will be examining such mergers with the utmost care. And it is only fair to say--as I indicated last week--that we expect to move rather promptly in some such cases." Mr. McLaren said that the Division also "will be looking very hard at reciprocity arrangements." He said that such arrangements, especially when conducted by big, diversified companies "substitute buying power consideration for the normal and accepted ways of selling, i.e., on the basis of price, quality and service--with foreclosure effects on smaller or less diversified competitors." In concluding the Assistant Attorney General promised that while the Division expected to conduct a vigorous enforcement program "we expect it to be a common sense--not a doctrinal-- program."

FBI's UNIFORM CRIME REPORTS SHOW 17 PERCENT INCREASE IN SERIOUS CRIMES

March 10, 1969: Serious crime in the United States increased 17 percent in 1968 when compared with 1967 according to figures made available through the FBI's Uniform Crime Reports and released by Attorney General John N. Mitchell.

FBI Director J. Edgar Hoover said all Crime Index offenses registered substantial increases in volume. Crimes of violence were up 19 percent, led by robbery up 29 percent, murder and forcible rape up 14 percent each, and aggravated assault up 12 percent. The crimes against property rose by 17 percent as a group. Individually, larceny $50 and over in value rose 21 percent, auto theft up 18 percent, and burglary was up 13 percent.

Mr. Hoover stated crime increases were reported by all city population groups, with the sharpest change in volume noted in the large core cities 250,000 and over in population up 18 percent. The suburban areas recorded an overall increase of 18 percent, while the rural areas were up 12 percent in volume.

The crime increases, according to Mr. Hoover, were constant throughout the United States. The North Central states had an overall increase of 13 percent, the Southern States 16 percent increase, the Western States 18 percent increase, while the heavily populated Northeastern States recorded an average increase of 21 percent.

The FBI Director noted that the violent crime of armed robbery had a sharp upswing of 34 percent and armed robbery made up 61 percent of all robbery offenses. Serious assaults where a gun was used as the weapon rose 24 percent and nearly one out of every four aggravated assaults was committed with a gun.

The figures released by the FBI disclose that in 1968 police arrests for all criminal acts, excluding traffic offenses, increased 4 percent. Arrests of adults rose 3 percent, while arrests of juveniles continued to climb in 1968 with an 11 percent rise.

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Director Harlington Wood, Jr.

APPOINTMENTS

ASSISTANT UNITED STATES ATTORNEYS

California, Central - LAWRENCE V. BROOKES: University of California, Berkeley, B.A.; Boalt Hall, University of California Berkeley, J.D. Formerly in private practice.

Pennsylvania, Eastern - JAMES R. McGILL: Mt. St. Marys College, B.S.; University of Richmond, LL.B. Formerly Assistant Staff Judge Advocate, U.S. Air Force.

New York, Southern - RICHARD S. RUDICK: Middlebury College, A.B.; Yale Law School, LL.B. Formerly in private practice; also Assistant to House Counsel New York Times.

New York, Southern - RICHARD S. TODER: Columbia College, Harvard Law School. Formerly in private practice.

RESIGNATIONS

New Jersey - EDWIN H. STIER: To become Special Counsel to Organized Crime Unit, Department of Law & Public Safety, New Jersey.

New York, Southern - STEPHAN E. KAUFMAN: To become Vice President of L.M. Rosenthal and Co., New York.

Ohio, Southern - EDDIE W. McCROOM: To become Executive Vice President of Building and Loan Association.

Tennessee, Eastern - ROBERT A. SCOTT: To become associate with Finnell, Thompson & Shockey.

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

COURT DENIES NEW TRIAL IN SHERMAN ACT CASE.

United States v. The Brookman Co., Inc., et al. (D. Ariz., Cr. 39462; January 15, 1969; D.J. 60-191-9)

On January 15, 1969, Judge C. A. Muecke of Phoenix, Arizona issued a 31-page opinion denying a motion for a new trial made by J.A. Mancini who was found guilty of conspiracy to rig bids on resilient floor covering contracts by jury verdict on July 13, 1967.

Mancini originally pled nolo contendere in May 1964 and was sentenced to a fine and 90 days in jail to be served. His motion for permission to withdraw his nolo plea under Rule 32(d) was denied without a hearing and Mancini appealed to the Ninth Circuit which reversed solely on the failure to hold a hearing. On remand Mancini argued that, misunderstanding the possible penalty, he had pled nolo to save expense and publicity and had claimed innocence at the pre-sentencing hearing. Judge William T. Sweigert found these contentions without merit, but in an exercise of discretion he granted withdrawal of the plea in August 1965 and disqualified himself from further participation in the case.

In July 1967 the case was tried to a jury under Judge William C. Mathes. Upon return of the guilty verdict Judge Mathes remanded Mancini to jail to await sentencing. After spending 20 hours in the city jail Mancini was released on $10,000 bail, granted by Chief Judge Harris pursuant to the Bail Reform Act of 1966.

On July 24, 1967, five minutes before he was to pass sentence on Mancini, Judge Mathes was found dead in his chambers of a heart attack. Judge Muecke was named successor judge. After hearing oral argument and reviewing voluminous briefs, he denied the new trial motion. The court found that the transcript did not reveal "a preponderance of the evidence heavily against the verdict"; that the trial judge, Judge Mathes, did not abuse his prerogative of interrogation and comment; that the Government did not put in evidence which exceeded its bills of particulars, as claimed; that the court did not err in admitting evidence, including especially testimony concerning the "ordinary course of business" at meetings of the conspirators and the participants' "understanding" of the

terms used at such meetings; that the court did not err in ruling that discarded witness notes taken by Government counsel were not shown to have been "adopted" within the meaning of the Jencks Act by testimony of a witness that he had been read to from unidentified papers and asked to confirm their contents; and that Government counsel were not guilty of misconduct in their utilization of grand jury transcript and prior affidavits in cross-examination.

The court further held that there was no error in the trial judge's instructions; that the trial judge did not coerce a verdict by subjecting the jury to excessive pressure to quickly return a verdict, and that, contrary to defendant's contention that only the judge who tried the case and heard the witnesses could rule on a new trial motion, Rule 25(b) "vests the successor judge with discretion to accept the duties of the trial judge or to grant a new trial".

On February 14, 1969, Judge Muecke imposed a fine of $2,000 on Mancini.

Staff: Marquis L. Smith, Robert J. Staal and J. Frederick Malakoff (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

NATIONAL BANK ACT - JUDICIAL REVIEW

APPOINTMENT OF CONSERVATOR AND SALE OF ASSETS OF NATIONAL BANK ARE DISCRETIONARY ACTS OF COMPTROLLER OF CURRENCY AND HENCE NOT SUBJECT TO JUDICIAL REVIEW

In the Matter of: The Conservatorship of the Wellsville National Bank, Wellsville, Pennsylvania (C.A. 3, No. 17,051; February 17, 1969; D.J. 145-3-854)

The Comptroller of the Currency appointed a Conservator for the Wellsville National Bank, York County, Pennsylvania, because of serious impairment of the bank's solvency and safety. He directed the Conservator to sell all the assets of the Wellsville Bank in exchange for the assumption of all the bank's liabilities by the Hanover Trust Co. The Conservator petitioned the district court to approve the purchase and assumption agreement; and the district court did so, concluding that the purchase and assumption agreement was "fair, just and equitable" and that the sale of the assets was "in the best interests" of the conservatorship estate. The court also provided that a copy of its order be served upon all stockholders of the Wellsville Bank. Subsequently, two minority stockholders of the Wellsville Bank sought to intervene and to set aside the district court's approval of the sale. The district court considered the stockholders' contentions, but rejected their motions.

The Third Circuit unanimously dismissed the stockholders' appeal, ruling that the Comptroller's appointment of a Conservator was a discretionary act not subject to judicial review. The Court also held that the Conservator's sale of the assets of the Wellsville Bank was within the Conservator's authority pursuant to the National Bank Act since the Bank was indisputably insolvent, and that, there being no showing of fraud, the district court's order approving the sale was not appealable. The Court also rejected the stockholders' contentions that the Comptroller's action was a taking of property without due process of law and just compensation.

Staff: Morton Hollander and Leonard Schaitman
(Civil Division)

SOCIAL SECURITY ACT

ADMINISTRATIVE RES JUDICATA NO BAR TO CASE OTHERWISE SUBJECT TO BEING REOPENED BY SECRETARY.

Harley P. Grose v. Cohen (C.A. 4, No. 12,722; February 5, 1969; D.J. 137-84-598)

In 1961 Grose applied for disability benefits alleging disability commencing in 1948. After hearing, his claim was denied and no judicial review was sought. In 1966 Grose filed another application for benefits, and the hearing examiner, noting a lack of new and material evidence, held this application barred by res judicata. The district court affirmed.

The Fourth Circuit reversed, ruling that a prior decision which, under the Secretary's own regulations, is subject to being reopened for cause, is not a res judicata bar to a later claim. Under the Secretary's regulations, "an error * * * on the face of the evidence" is grounds for reopening, 20 C.F.R. 404.957, 404.958. Reviewing the record of the hearing on the first claim, the Court held that it was such error for the Secretary to attribute earnings of about $150 per month only to Grose; since the uncontradicted evidence disclosed the necessity of help from his family, some of the income should have been charged to them. That mistake, said the Court, coupled with the sketchy earnings information at the earlier hearing, made the first estimate of earnings inherently inaccurate thereby subjecting the case to reopening and removing the res judicata bar.

Staff: United States Attorney Milton J. Ferguson; Assistant United States Attorneys Charles M. Love, III and W. Warren Upton (S.D. W. Va.)

DISABILITY CLAIMANT'S BENEFITS MAY NOT BE AWARDED FOR MORE THAN ONE YEAR BEFORE DATE OF APPLICATION; THIS STATUTORY LIMITATION ON BENEFITS MAY NOT BE WAIVED BY FAILURE TO RAISE AT TRIAL, AND MAY BE BROUGHT TO COURT'S ATTENTION VIA RULE 60(b) MOTION

Pearl O. Meadows v. Wilbur J. Cohen, Secretary of Health, Education and Welfare (C.A. 5, No. 26674; February 4, 1969; D.J. 137-76-124)

Claimant filed an application for disability benefits in December 1965, alleging disability commencing in June 1960. The Secretary, finding that the claimant was not under a disability until December 1965, awarded

benefits from that date, and the claimant appealed. The district court held that her disability had begun in June 1960, and awarded benefits beginning from that date. The Secretary then filed a motion with the district court under Rule 60(b), F.R.Civ.P., asserting that, under 42 U.S.C. 423(b), an award of benefits may be made retroactive only 12 months prior to the date of application irrespective of the fact that the disability allegedly commenced at an earlier date. The district court denied the motion.

The Fifth Circuit reversed and modified the judgment. In so doing, it rejected claimant's argument that the limitation of 42 U.S.C. 423(b) had been "waived" by not being raised at trial, and held that the statute was an absolute requirement that plaintiff's benefits be limited to 12 months prior to the date of her application. The statute, said the Court, does not provide an affirmative defense but "is as much a part of the grant of legislative benefits as are the schedules of benefits payable".

Staff: Robert E. Kopp (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

NEW LEGISLATION

There were enacted during the 90th Congress, 1st and 2d Sessions, 51 statutes containing provisions of particular interest to the Criminal Division. The list of such statutes is set forth below. Legislative histories of some of these statutes have already been compiled and are on file in the Legislation and Special Projects Section of the Division; the others are in process of being compiled.

Public Law No.	
90-19	Housing Laws, Amendments - Nomenclature Changes Reflecting Creation of HUD
90-23	Administrative Procedure Act - Public Information - Codofication of P.L. 89-487
90-40	Military Selective Service Act of 1967
90-61	National Advisory Commission on Civil Disorders - Subpoena Power
90-83	Government Organization and Employees - Amendment of Titles 5, 14, 37 USC
90-100	Commission on Obscenity and Pornography
90-108	Capitol Buildings and Grounds - Security
90-123	Obstruction of Criminal Investigations
90-148	Air Quality Act of 1967
90-174	Partnership for Health Amendments of 1967
90-201	Wholesome Meat Act
90-203	Banks and Banking - To Prohibit Participation in Certain Gambling Activities
90-219	Judicial Center - Establishment

Public Law No.	
90-222	Economic Opportunity Amendments of 1967
90-226	D. C. Crime and Criminal Procedure
90-255	Savings and Loan Company Amendments of 1967
90-258	Commodity Exchange Act - Amendment
90-274	Jury Selection and Service Act of 1968
90-284	Civil Rights Act
90-291	Law Enforcement Officers - Injury or Death Benefits - Eligibility
90-299	Communications Act of 1934 - Amendment - Obscene or Harassing Telephone Calls - Prohibition
90-321	Consumer Credit Protection Act
90-331	Presidential Candidates - Secret Service Protection
90-351	Omnibus Crime Control and Safe Streets Act of 1968
90-353	Post Office - Postage Stamps - Reproductions
90-357	Canal Zone Code - Amendments
90-381	Seal, Arms, Flag and Other Insignia - Flag Desecration
90-384	Post Office - Employees - Prosecution for Embezzlement
90-389	Bank Protection Act of 1968
90-399	Animal Drug Amendments of 1968
90-413	Post Office - Letter-Carrier Uniforms
90-421	International Claims Settlement Act of 1949 - Amendment
90-439	Securities Exchange Act of 1934 - Amendment
90-440	District of Columbia Air Pollution Control Act

ublic Law No.	
90-441	District of Columbia - Disorderly and Obscene Acts - Prosecution
90-448	Housing and Urban Development Act of 1968 - Title XIV Interstate Land Sales Full Disclosure Act
90-449	Post Office - Employees - Disciplinary Action
90-452	District of Columbia Alcoholic Rehabilitation Act of 1967
90-462	Omnibus Crime Control and Safe Streets Act of 1968 - Amendment
90-481	Natural Gas Pipeline Safety Act of 1968
90-487	Grain Standards Act
90-492	Wholesome Poultry Products Act
90-518	Intoxicating Liquors - Interstate Shipments - Bill of Lading Requirements
90-535	Forgery - Forged Traveler's Checks - Transportation
90-543	National Trails System Act
90-560	Motor Vehicle Master Keys - Mailing, Regulation
90-578	Federal Magistrates Act
90-587	D. C. Government - Police Mutual Aid Agreements
90-618	Gun Control Act of 1968
90-632	Military Justice Act of 1968
90-639	Food, Drug, and Cosmetic Act - As Amended - LSD and Other Depressant and Stimulant Drugs - Possession, Restriction

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

COURTS OF APPEALS

EVIDENCE

SPECIAL AGENT MAY PROPERLY INTERVIEW TAXPAYER WITHOUT ADVISING OF RIGHT TO COUNSEL.

Hensley v. United States (C.A. 10, No. 9832; December 27, 1968; D.J. 5-49-774)

The Tenth Circuit has now joined the so-far unanimous parade of circuits (see Bulletin, January 31, 1969, pp. 100-102) which hold that a special agent, who asks information from a taxpayer whom he is investigating, need not give the Miranda-Escobedo-Mathis warnings unless the interview amounts to a custodial interrogation. The Court refused to apply the rule because the taxpayer was not in custody, and noted its disagreement with United States v. Wainwright, 284 F. Supp. 129 (D. Colo.), and United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill.), the two district court cases most frequently cited by taxpayers' counsel for the applicability of Miranda and Mathis regardless of custody. All circuits, with the exception of the Third and the District of Columbia, have now decided this issue in favor of the Government.

The Court also upheld the constitutionality of 26 U.S.C. 7206(1) which prohibits the making and subscribing of false returns, and held that a single false return may give rise to separate offenses, i.e., a violation of Section 7206(1) and a wilful attempt to evade taxes in violation of Section 7201.

Staff: United States Attorney John Quinn and Assistant United States Attorney John A. Babington (D. N. Mex.)

TAXPAYER'S FAILURE TO EXPLAIN DISPROPORTIONATE NET WORTH INCREASES, CALLED TO HIS ATTENTION BY INVESTIGATING AGENTS, MAY BE PLACED IN EVIDENCE AND COMMENTED ON IN ARGUMENT TO JURY.

Hayes v. United States (C.A. 5, No. 23540; January 29, 1969; D.J. 5-17-350)

Prosecution witnesses testified, without objection, that the defendants failed to provide any explanation when the investigating agents asked why there were large discrepancies between the defendants' returns and the results of the agents' net worth computations. Defendants themselves testified that their attorneys had advised them to refuse any explanations in reliance upon the privilege against self-incrimination. The explanation they advanced at the trial, for the first time, was a pre-existing $64,000 cash hoard.

In his opening argument to the jury the prosecutor urged that, if the $64,000 actually existed, defendants would certainly have revealed it when asked for an explanation during the investigation. Defense counsel countered by telling the jury that no explanation had been given because counsel had advised the defendants to claim the Fifth Amendment. In closing, the prosecutor asked the jury whether they believed that defendants would have stood upon their constitutional rights if they did have the $64,000 hoard.

The majority holds that under the circumstances the prosecutor's comment on the claim of self-incrimination was invited by the defense and did not constitute prejudicial error. Judge Goldbold dissented in the belief that "the government used appellant's exercise of his Fifth Amendment privilege as an affirmative weapon to convict". Both the majority and the dissent seem to agree that the prosecution may present evidence of a failure to explain during the investigation, and argue that this is evidence of guilty knowledge, so long as no mention is made of the claim of the privilege against self-incrimination. See IV Wigmore Evidence (3rd ed.), Sections 1071, 1072; Sparf & Hansen v. United States, 156 U.S. 51, 56; United States v. Holovachka, 314 F.2d 345, 355 (C.A. 7), certiorari denied 374 U.S. 809; Beard v. United States, 222 F.2d 84, 94 (C.A. 4), certiorari denied 350 U.S. 846; Smith v. United States, 236 F.2d 260 (C.A. 8), certiorari denied 352 U.S. 909; see also Holland v. United States, 348 U.S. 121, 138-139.

Staff: United States Attorney Clinton Ashmore; Assistant United States Attorney Stewart J. Carrouth (N.D. Fla.); John P. Burke and Joseph M. Howard (Tax Division)

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