

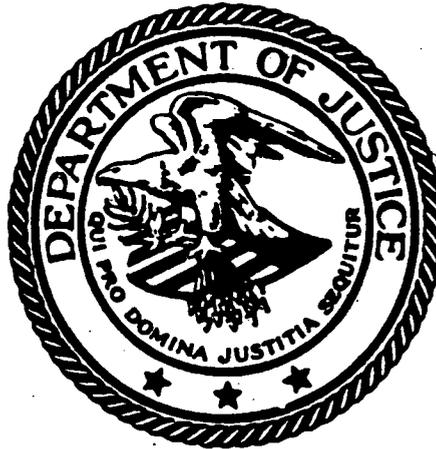
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UNITED STATES ATTORNEYS

BULLETIN

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JOB WELL DONE

The Postal Inspector in Charge has expressed appreciation for the very fine manner in which Assistant United States Attorney George E. Juba, District of Oregon, handled a recent criminal case. The case involved burglary of a post office and subsequent possession of postal money orders stolen from that office.

Assistant United States Attorney J. R. Sparks, Northern District of Georgia, has been commended by the Assistant General Counsel, Department of Health, Education, and Welfare, for his fine work and excellent handling of a criminal prosecution under the Food, Drug, and Cosmetic Act.

The Commander in Chief, Pacific, and the Commander, 14th Coast Guard District have commended United States Attorney Louis B. Blissard, District of Hawaii, for the successful prosecution of a case involving an injunction and subsequent criminal contempt of court action against a group of pacifists who attempted to sail a vessel into an atomic testing area.

United States Attorney Wendell A. Miles and Assistant United States Attorney Robert J. Danhof, Western District of Michigan, have been commended by the Administrator, Small Business Administration, for the excellent legal services and cooperation they rendered in the handling of a complicated case based on a small business loan.

The Deputy General Counsel, Department of Agriculture, has commended United States Attorney Harry Richards and his staff, Eastern District of Missouri, for the successful prosecution of a lending agent in Commodity Credit Corporation's cotton loan program for delivery of false certificates to the Corporation.

The work of Assistant United States Attorney Floyd M. Buford, Middle District of Georgia, has been commended in a case dealing with the Milk Solids Distribution Program of the Commodity Credit Corporation. This was a case of first impression and resulted in a substantial judgment for the United States. The successful handling of this case received the strong commendation of the Attorney in Charge of the Department of Agriculture, and also of the Trial Judge who complimented Mr. Buford in open court.

The Acting Regional Attorney, Interstate Commerce Commission, has commended Assistant United States Attorney Donald H. Shaw, Southern District of New York, for his highly effective preparation and presentation which resulted in the successful disposition of a case involving violations of the Interstate Commerce Act.

The Chairman of the Federal Petroleum Board has expressed the appreciation of his Board for the cooperation, understanding and superb manner in which United States Attorney Russel B. Wine and Assistant United States Attorney Robert S. Pine, Western District of Texas, disposed of two Petroleum Board cases.

The Solicitor of the Department of Labor has expressed appreciation for the cooperation of United States Attorney Hartwell Davis and Assistant United States Attorneys Ralph Daughtry and Robert E. Varner, Middle District of Alabama, in the successful handling of two cases under the Fair Labor Standards Act.

Assistant United States Attorney Warren Max Deutsch, Eastern District of New York, has been commended by the Assistant Regional Commissioner, Internal Revenue Service, for the successful prosecution of a recent income tax case involving false and fraudulent statements in connection with the submission of net worth statements.

The Assistant Chief of Engineers for Personnel, Department of the Army, has, on the occasion of the resignation of Assistant United States Attorney Arthur Howard Bloomberg, expressed the sincere appreciation of the Chief of Engineers for his fine spirit of cooperation and successful efforts in reducing the heavy backlog of cases in the Boston, Massachusetts, area, while still keeping current with new acquisitions.

* * *

OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Contingent Interest Vestible Under Trading With the Enemy Act.
Rogers v. Hartford-Connecticut Trust Company (D. Conn.). Under the will of Elise von Baeckmann the residue of the estate was left in trust for the payment of income to American beneficiaries until the war should cease and friendly relations with Germany be resumed, and in that event the corpus should be paid over to the German beneficiaries or their surviving children. The interest of the Germans in the trust was vested in 1947, and the vesting order was later amended to include personal representatives and heirs of the Germans and to include the interest of the Germans in the estate of the decedent. Defendant contended that the contingent interest of the Germans was not subject to seizure. The Court (J. Joseph Smith, Chief Judge) entered judgment for the Attorney General and ordered distribution of the corpus (about \$35,000 in value) to him, holding that contingent interests are subject to seizure under the Act and citing the recent decisions in Hermann v. Rogers (C.A. 9) and Kammholz v. Allen (C.A. 2).

Staff: The case was tried by Lillian C. Scott (Office of Alien Property), assisted by Assistant United States Attorney Henry P. Stone (D. Conn.).

* * *

ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT

Indictments Filed Under Section 3. United States v. Greater Washington Chevrolet Dealers Association Cooperative, et al., (D.C.), United States v. Akers Oldsmobile Cadillac Co., et al., (D.C.), United States v. The Arlington Motor Company, Inc., et al., (D.C.). On July 28, 1958, a federal grand jury returned three separate indictments naming as defendants three groups of automobile dealers doing business in the Washington Metropolitan area, an association composed of fourteen franchised Chevrolet dealers, and the Ford Motor Company. Each of the indictments charged defendant dealers with a combination and conspiracy to raise, fix and stabilize retail prices of new automobiles and accessories sold in restraint of trade and commerce in violation of Section 3 of the Sherman Act.

The first indictment, returned against fourteen franchised Chevrolet automobile dealers and a Chevrolet dealers association, alleges in count one that defendants have agreed (a) to adopt uniform retail price lists to be used by defendant dealers in selling Chevrolet automobiles and accessories to the public; (b) to have the defendant association print and distribute the uniform retail price lists agreed upon by defendant dealers; (c) to have each of the defendant dealers use the uniform retail price lists distributed by the association in connection with the retail sales of Chevrolet automobiles and accessories; and (d) to have the defendant dealers refrain from price advertising of current model Chevrolet automobiles, and from advertising current model demonstrators, official cars and company cars, except after a specified date late in the model year.

Count two of this indictment charges that defendants have engaged in a combination and conspiracy to raise, fix and stabilize the hourly labor rates charged by defendant dealers by agreeing upon uniform hourly labor rates to be charged for the repair and servicing of automobiles in connection with both warranty work and regular customer work.

The first count of the indictment against eleven franchised Oldsmobile dealers charges the dealers with a combination and conspiracy to raise, fix, and stabilize the retail prices of oldsmobiles and accessories sold in the Washington metropolitan area by agreeing to adopt uniform retail price lists; and by agreeing to refrain from price advertising of current model Oldsmobiles, and from advertising current model demonstrators, official cars and company cars.

The second count charges a combination and conspiracy to fix and establish a minimum gross profit of \$450 to be made on the sale of Oldsmobiles, and that the terms of this combination and conspiracy

consisted of an agreement among the dealers (a) to refrain from making retail sales of new Oldsmobiles at prices which would result in the dealer realizing a gross profit less than \$450; (b) to determine whether the minimum gross profit was realized a used car accepted in trade would be deemed to have a cash equivalent that was not to exceed the current wholesale value of such automobile as set out in a specified trade publication reporting market prices; and (c) to permit inspection of sales invoices or other business records showing the details of any specified sale of an Oldsmobile in instances where another defendant dealer desired to ascertain whether the agreed upon minimum gross profit had in fact actually been realized.

The third indictment against the seventeen franchised Ford dealers and the Ford Motor Company contains three counts. In the first count it is charged that defendant dealers for a period of several months in 1956 engaged in a combination and conspiracy to fix and establish a minimum gross profit to be made on sales of Ford automobiles by agreeing to refrain from making retail sales of new Ford automobiles at prices which would result in the dealer realizing a gross profit less than \$225 except in cases of fleet sales and sales to governmental agencies.

The second count charges that since 1951 defendant dealers and the Ford Dealers' Advertising Fund of Washington, D. C., named as a co-conspirator, have engaged in a combination and conspiracy to raise, fix and stabilize the retail prices of Ford automobiles and accessories sold by agreeing to adopt and utilize the uniform retail price lists published and distributed by the FDAF; and by agreeing to refrain from price advertising of current model Ford automobiles and from advertising current model demonstrators, official cars and company cars.

The third count charges that since about April, 1954 defendant dealers and the Ford Motor Company have engaged in a combination and conspiracy to raise, fix and stabilize the prices of Ford parts and accessories sold by defendant dealers by agreeing (a) to fix the resale prices at which Ford dealers in the Washington Metropolitan area would sell Ford parts and accessories to various classes of purchasers; (b) to sell Ford parts and accessories to purchasers classified by defendant Ford dealers as authorized wholesale purchasers at the suggested wholesale list prices established by the Ford Motor Company; (c) to sell Ford parts and accessories to all other purchasers, except insurance companies, at the suggested retail list prices established by the Ford Motor Company; (d) to sell Ford parts and accessories to insurance companies at a maximum discount of 15% from the suggested retail list price established by the Ford Motor Company; (e) to utilize a Ford Parts Identification Card Program for the purpose of insuring that only persons classified as authorized wholesale purchasers would be permitted to purchase parts at the suggested wholesale list prices established by the Ford Motor Company; and (f) to grant no discounts from the suggested list prices on parts and accessories except in accordance with the above plan.

The defendants are scheduled to be arraigned on August 22, 1958.

Staff: Paul A. Owens, Jennie M. Crowley and Merle D. Evans, Jr.
(Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURT OF APPEALSADMIRALTY

Personal Injury and Death Claims; Civil Service Seamen Employed on Board Merchant Vessels Owned and Operated by United States Cannot Recover from United States Under Suits in Admiralty Act; Sole Recourse Is Under Federal Employees' Compensation Act. Patterson v. United States (and 4 other cases) (C.A. 2, July 11, 1958). Libelants, alleging jurisdiction under the Suits in Admiralty Act, 46 U.S.C. 741, et seq., sought recovery from the United States for injuries sustained while employed as civil service seamen on board merchant vessels owned and operated by the United States. The district court dismissed. The Court of Appeals affirmed on the strength of Johansen v. United States, 343 U.S. 427, which held that a civil employee of the United States injured on board a public vessel of the United States could not recover for his injuries under the Public Vessels Act, 46 U.S.C. 781, et seq., his sole recourse being under the Federal Employees' Compensation Act, 5 U.S.C. 751, et seq.

Staff: Leavenworth Colby (Civil Division).

ATTORNEY'S FEES

Validity of Provision Limiting Attorney's Fee to \$10 in Claims Before VA. Gostovich v. Valore (C.A. 3, July 8, 1958). This action was brought to enjoin a VA adjudication officer from enforcing the provisions of 38 U.S.C. 3604 (1958 Supp.) proscribing contingent fee arrangements and limiting the attorney's fee to \$10 in cases before the VA for administrative disposition. Alleging that this limitation was unconstitutional in that it deprived claimants of the right to counsel, plaintiff demanded that a three judge district court be convened pursuant to 28 U.S.C. 2282 and 2284. A three judge court was convened and dismissed the petition on the ground that no substantial constitutional question was presented and remanded the case to the single judge district court for disposition of nonconstitutional issues. The single judge court dismissed the complaint ruling that there was no merit to plaintiff's nonconstitutional argument that the limitation provision was impliedly repealed by that provision of the Administrative Procedure Act, 5 U.S.C. 1005(a), providing for representation of persons by counsel before administrative agencies.

Plaintiff appealed the three judge court action directly to the Supreme Court, which dismissed the appeal on the Government's motion to dismiss or affirm. On plaintiff's concurrent appeal to the Third Circuit, both parties argued the merits of the constitutional and non-constitutional issues. As to the former, the Court of Appeals held that the Supreme Court's dismissal was dispositive and that the Court of Appeals had no authority to review the action of the three judge court.

The Court affirmed dismissal of the complaint by the single judge, ruling that the Administrative Procedure Act did not repeal the \$10 limitation provision, which, in any event, had been reenacted subsequent to the Administrative Procedure Act in the Veterans' Benefits Act of 1957.

Staff: Herbert E. Morris (Civil Division).

GOVERNMENT CONTRACTS

Breach of Covenant Against Contingent Fees in Government Sales Contract; Government Entitled to Amount of Fee Paid Plus Interest from Date of Breach. J. D. Street Co. v. United States (C.A. 8, June 26, 1958). This action was brought by the government to recover \$25,000, with interest, from defendant J. D. Street Co. for its breach of a covenant against contingent fees in a contract involving the sale to defendant of certain government surplus property. The covenant provided that "[t]he successful bidder warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage brokerage, or contingent fee" and further provided that the government, in the event the warranty was breached, was entitled to recover the amount of the fee paid. Defendant admitted that it had paid \$25,000 to a third party in connection with its purchase of the government property, but contended that the money was paid only to "expedite" the transaction, and not to solicit or secure the contract. The district court, rejecting all of defendant's arguments, held that the evidence clearly showed that the third party had been employed to solicit the contract; that legal authorization existed for the inclusion of such a covenant in a government sales contract (see 50 U.S.C. App. 601; 6 F.R. 6787; 10 F.R. 1661; 40 U.S.C. 484(c)); and that the covenant was, in effect, a reasonable provision for liquidated damages rendering unnecessary any proof of actual damage. Judgment of \$25,000 was awarded to the government, but the court declined to award any prejudgment interest. Defendant appealed from the principal judgment, and the government cross-appealed from the failure to award interest.

The Court of Appeals affirmed the principal judgment in all respects, pointing out also that, even absent specific statutory authorization, the government, like any other contracting party, may incorporate liquidated damages provisions in its contracts. See Rex Trailer Co. v. United States, 350 U.S. 148, 151. The Eighth Circuit's decision is of particular importance in that it represents the first appellate ruling as to the right of the government to recover contingent fees in a government sales contract. Heretofore, the Government's right to recover such fees has been limited to contracts where the government is the purchaser.

With respect to the government's cross-appeal, the Court of Appeals found nothing in the record "to justify the refusal to allow prejudgment interest on the amount of liquidated damages which became due and owing to the Government as of the time of the breach of covenant." The district court was directed to award interest "at a fair rate" from the date of breach.

Staff: Seymour Farber (Civil Division).

VETERANS' ADMINISTRATION

Servicemen's Indemnity Act of 1951; Jurisdiction to Review Veterans' Administration's Denial of Indemnity. Hall v. United States (C.A. 4, June 30, 1958). The Court of Appeals held that there is no jurisdiction in the district courts to entertain suits against the United States to recover the \$10,000 gratuitous indemnity provided for servicemen's survivors by the Servicemen's Indemnity Act of 1951. The Court followed similar decisions of the First, Fifth, Sixth, and Eighth Circuits (Cyrus v. United States, 226 F. 2d 416 (C.A. 1); Acker v. United States, 226 F.2d 575 (C.A. 5), certiorari denied, 350 U.S. 1008; United States v. Houston, 216 F.2d 440 (C.A. 6); Turner v. United States, 237 F.2d 700 (C.A. 8), and rejected the contrary decision of the Second Circuit in Wilkinson v. United States, 242 F.2d 735, certiorari denied, 355 U.S. 839.

Staff: Bernard Cedarbaum (Civil Division).

COURT OF CLAIMSRETIREMENT PAY

Constitutionality of So-called "Hiss Act". Steinberg v. United States (C. Cls., July 16, 1958). 5 U.S.C. 740 prohibits payment of annuity or retired pay to any person who refuses, on the ground of self-incrimination, to testify before a grand jury, a Congressional committee, or in court, with respect to his service as an officer or employee of the government. Plaintiff, a retired employee of the Internal Revenue Service, refused to testify before a grand jury. Subsequently he was indicted but acquitted. However, his Civil Service annuity was terminated under the statute. In a 4-1 decision, the Court of Claims held that he was entitled to recover the withheld annuity. Two of the majority judges based their decision on the ground that although there is no vested or contractual right to an annuity, Congress had unconstitutionally given a meaning to the Fifth Amendment which presumes guilt. The other two majority judges rested their decision on the concept that a retired federal employee has a vested right to his retired pay. The dissenting judge relied upon Beilan v. Board of Public Education and Lerner v. Casey, both decided by the Supreme Court on June 30, 1958, holding that states could discharge public employees in such a situation, not because they invoked the Fifth Amendment, but because they refused to answer proper questions bearing on their official duties and their competence to perform such duties. The question of whether Supreme Court review of this decision should be sought is under consideration.

Staff: Kendall M. Barnes (Civil Division).

DAVIS-BACON ACT

Validity of Agreement to Pay Minimum Wages to Be Fixed by Secretary of Labor. Bushman Construction Co. v. United States (C. Cls., July 16, 1958). Plaintiff submitted a bid pursuant to an invitation which set

forth minimum wage rates set by the Secretary of Labor, but which further stated that hearings were scheduled for a redetermination of these prevailing wage rates, and that any resulting redetermination should become the minimum wages under the contract. Plaintiff was the low bidder and the contract was signed containing a similar provision. Thereafter the Secretary of Labor determined the prevailing wages to be higher than those specifically set out, and plaintiff was required to pay such wages. Plaintiff sought to recover these higher wages, on the ground that the Davis-Bacon Act only provided for payment of wages prevailing on the date of the contract. The Court agreed with plaintiff's contention, but held that there was no provision of law which prevents the insertion in a contract of a provision comparable to that found here, and dismissed the petition.

Staff: Francis J. Steiner, Jr. (Civil Division).

GOVERNMENT CONTRACTS

Right of Contractor's Assignee to Recover Unpaid Balances at Date of Termination. National City Bank of Evansville v. United States (C. Cls., July 16, 1958). A contractor on three Navy construction contracts had assigned all moneys to become due under the contracts to plaintiff. On the date of the contractor's termination for default, certain amounts had been "earned" since the last progress payments. These were retained by the United States and used to complete the contracts. To some extent, therefore, they inured to the benefit of the sureties on the contractor's performance bonds. The Court held that plaintiff's right, if it had one, was against the surety on an alleged subrogation agreement, but that there was no claim against the United States, since, absent the assignment, the government could have used the unexpended funds to complete the contracts.

Staff: Kathryn H. Baldwin (Civil Division).

DISTRICT COURT

ADMIRALTY

Pleadings; National of Foreign Country Suing United States for Tort Alleged to Have Occurred on Board Public Vessel Must Plead Reciprocity Under 46 U.S.C. 785. Macini v. United States (E.D. N.Y., July 10, 1958). Libelant, as administratrix of the estate of a longshoreman fatally injured on board a public vessel of the United States, filed suit under the Public Vessels Act, 46 U.S.C. 781, et seq., alleging in the libel, inter alia, that she was a citizen of the Republic of Italy. The United States filed exceptive allegations alleging that the libel did not state a cause of action within the jurisdiction of the court in that it did not allege that a national of the United States would have a reciprocal right to sue the Italian Government for a tort occurring on board a public vessel of the Republic of Italy as required by 46 U.S.C. 785. The Court sustained the exceptive allegations. The Court also held that a certified statement of law issued by the Italian Consul in New York

stating that there was reciprocity could not be deemed to supply the deficiency in the pleading.

Staff: Robert D. Klages (Civil Division).

Seaman's Employer Has Cause of Action to Recover Maintenance Payments Made to Seamen as a Result of Injuries Caused by Third Party in Course of Performance of Contract with Employer. United States v. Tug Manzanillo, et al. (D. Ore., July 10, 1958). The government brought this action against the tug and her owners to recover the amount of maintenance payments which the government had made to a seaman (master) employed by the government on a Maritime Administration vessel. The tug was engaged to place the government vessel in the Reserve Fleet and after arrival at the Fleet, the tug stood by to take off the riding crew. Upon coming down the ladder from the ship to the tug, the master stepped on a small hatch cover which gave way with the result that he fell and suffered injuries requiring payment of maintenance money by the government.

Respondents excepted to the libel on the theory of The Federal No. 2, 21 F. 2d 313, in which the court denied recovery in tort holding that maintenance had been paid by reason of a contract to which the tort-feasor was a stranger. The government argued that liability herein was based upon the failure of respondents to supply a seaworthy vessel and also, relying on the principles of Ryan Stevedoring Co. v. Pan-Atlantic SS Corp., 350 U.S. 124 and Weyerhaeuser SS Co. v. Nacirema Operating Co., 355 U.S. 563, on their failure to perform their contract in a safe and proper manner. The exceptions were denied and respondents were required to answer the government's libel.

Staff: Graydon S. Staring (Civil Division).

COMMODITY CREDIT CORPORATION

United States Is Neither Bound Nor Estopped by Acts of Its Agents Not Sanctioned or Permitted by Law. United States v. Oscar D. Padgett, d/b/a Waco Milling Company (M.D. Ga., May 7, 1958). Defendant purchased milk solids from the Commodity Credit Corporation under the LD-6 program of the Commodity and Stabilization Service of the Department of Agriculture. Under the program, the milk solids were sold subject to certain restrictions as to use and resale. Defendant bought several car loads of the solids, some through a broker-agent and some directly. In making the purchases, the broker and defendant stated that they were making the purchases subject to the terms of the program. Defendant alleged that he, personally, had never seen the terms of the program and was unfamiliar with them. He also contended that an agent of the CCC had advised him over the telephone that he could resell the solids, as long as the resale was before a certain date. Actually the program required, in addition, that the resale be at the same price as the original sale. Defendant resold some of the solids at an advance in price and in so doing, made himself liable for liquidated damages under a formula that resulted in damages greatly in excess of his profit on the resale.

Defendant claimed that the government was estopped because the alleged statements of its agent amounted to a fraud on him, and he also argued that the liquidated damages formula was actually a penalty. In directing a verdict for the government the Court held that the government is not bound or estopped by the unauthorized acts of its agents and that those dealing with a government agent must, at their peril, inquire into his authority. This is the first adjudicated case under the LD-6 Program.

Staff: Assistant United States Attorney Floyd M. Buford
(M.D. Ga.) and Frederick L. Smith (Civil Division).

FEDERAL EMPLOYEES' GROUP LIFE INSURANCE

Action Brought by Beneficiary of Alleged Designation Executed by Federal Employee in Hospital Prior to Retirement for Disability and Subsequent Death Dismissed as to United States. Fridolf D. Pearson v. Metropolitan Life Insurance Company of New York, et al. (D. Oreg., June 27, 1958). Plaintiff was one of three beneficiaries designated by an uncle to receive the benefits of his Federal Employees' Group Life Insurance policy. The alleged designation was executed by decedent in the hospital on November 7, 1955, and was delivered the following day to his employing office. The following month, the Civil Service Commission approved the employee's application for retirement, effective December 27, 1955. The employee died January 8, 1956, without executing any other designation of beneficiary. When claim was filed, the Civil Service Commission advised the Office of Federal Employees' Group Life Insurance that there was no designation of beneficiary on file with it. Therefore, distribution would be according to statutory precedence. The United States contended that the complaint failed to state a cause of action in that the government had properly advised the insurance company that no designation had been filed as, under Section 11 of the policy and 5 C.F.R. 37.10, prior designations of beneficiary are cancelled upon an employee's retirement and no new designation had been executed subsequent to said retirement in this case. At the conclusion of the presentation of plaintiff's case, the Court granted the government's motion to dismiss as to it.

Staff: United States Attorney C. E. Luckey, Assistant United States Attorney Edward Georgeff (D. Ore.) and Andrew P. Vance (Civil Division).

TORTS

Negligence; Wrongful Death; Contractual Provision That Safety Regulations Promulgated by Corps of Engineers Would Be Applicable to Work under Construction Contract Did Not Create Duty on Part of Government to Independent Contractor's Employee Killed During Course of Employment. Martha M. Kirk, et al. v. United States (S.D. Idaho, March 20, 1958). Plaintiffs were the widow and minor child of a contractor's employee killed when he fell from a scaffold while working as a carpenter on the construction of Lucky Peak Dam on the Boise River, Idaho.

The dam was being constructed under a contract with the Department of The Army, Corps of Engineers. It appeared from the evidence that decedent had been furnished with a safety belt to be used for security purposes while working on the scaffold, but he was not wearing it at the time of the accident. The Court found that the accident was caused by the negligence of other employees of the contractor, and that failure on the part of decedent to secure himself with his safety belt contributed to his death. It was contended by plaintiffs that government employees had failed to effectuate a program of accident prevention in accordance with the provisions of a Manual promulgated by the Corps of Engineers and made applicable to the work by the provisions of the contract. The Court held, however, that the duty on the part of the Corps of Engineers to initiate and carry out a safety program did not create a duty or an obligation of care to the deceased, and said: "It is not sufficient that some duty or obligation may have been neglected by the defendant or its servants, but it must have been some duty or obligation owed the deceased." The Court noted that there was no common law duty on the part of an employer of an independent contractor to enforce a safety program in regard to the employees of the independent contractor and said that the fact that an employer of an independent contractor retains the right to inspect the work under construction to see that the provisions of the contract are carried out, together with the right to stop work if they are not, is not sufficient in itself to make such employer liable for harm resulting from negligence of the independent contractor in conducting details of the work.

Staff: United States Attorney Ben Peterson (S.D. Idaho).

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CRIMINAL DIVISION

Assistant Attorney General Malcolm Anderson

FOOD, DRUG, AND COSMETIC ACT

Injunction Prohibiting Bakery from Labeling Enriched Bread "Buttermilk Bread," and from Using Nitrated Flour in Enriched Bread. United States v. Continental Baking Company (Dist. of Col.). In September, 1957 a temporary restraining order was issued against defendant, enjoining it from producing or causing to be produced for introduction or delivery into interstate commerce misbranded bread within the meaning of 21 U.S.C. 343(g).

The basis of the action was that defendant sold and distributed breads designated as "Buttermilk Bread" and "Buttermilk Enriched Bread," which, by reason of their composition, appearance, labeling, and promotional literature purported to be and were represented as enriched breads. Enriched bread is a food for which a definition and standard of identity have been prescribed by regulations issued pursuant to 21 U.S.C. 341. The breads should have been designated on their labels simply as "enriched bread," since that is the name specified in the definition and standard of identity for enriched bread and which the labels are required to bear in order to comply with 21 U.S.C. 343(g)(2). In addition, the breads failed to conform to the definition and standard required by 21 U.S.C. 343(g)(1) because they contained nitrated flour, an ingredient which is not permitted in such definition and standard of identity for enriched bread.

It had been determined by the Food and Drug Administration, Department of Health, Education, and Welfare, that use of the term "buttermilk bread" or "buttermilk enriched bread" results in the purchaser's believing that significant advantages are obtained by consuming these breads rather than those which conform to the administrative standards fixed by the regulations. Buttermilk is an ingredient permitted to be used in bread for which standards have been adopted. However, emphasizing the buttermilk ingredient leads consumers to believe that the buttermilk imparts a distinct advantage to the bread, which is not true.

On June 24, 1958, a consent judgment was entered, making the terms of the preliminary injunction in the matter permanent.

Staff: Assistant United States Attorney E. Riley Casey (D.C.);
Joseph L. Maguire, Attorney
Department of Health, Education and Welfare

NARCOTICS

18 U.S.C. 1407, Requiring Registration of Narcotic Addicts and Violators Entering or Departing from United States, Held Constitutional. Reyes v. United States; Perez v. United States (C.A. 9). In an opinion

filed on July 17, 1958, the Court unanimously affirmed the convictions in Reyes v. United States and Perez v. United States under 18 U.S.C. 1407 (effective July 18, 1956) which requires citizens of the United States, who are either addicted to narcotic drugs or convicted of a state or federal felony violation of the narcotic or marihuana laws, to register with the United States customs upon departing or entering or attempting to depart or enter the United States.

In rejecting defendants' claim that the statute is unconstitutional because indefinite, arbitrary and capricious, because it violates due process in requiring one by registration to incriminate himself, and because it interferes with his right of travel, the Court stated it was satisfied that these arguments were adequately met and answered in an opinion by United States District Judge Carter in United States v. Eramdjian (S.D. Calif., 1957), 155 F. Supp. 914, and hence was adopting the pertinent portion of that opinion. With respect to defendants' claim that the statute violates the Fifth Amendment by requiring one by registration to incriminate himself, the Court called attention to Judge Carter's conclusion that the alleged incriminating registration slip is not used against the defendant - he is prosecuted for not registering and for not surrendering the certificate; he is not prosecuted for making the certificate or for any fact appearing therein.

As to defendants' claim of error in the trial court's refusal to permit evidence of their lack of intent to violate the statute, the Court felt that Morissette v. United States, 342 U.S. 246; United States v. Behrman, 258 U.S. 280; United States v. Balint, 258 U.S. 250, are controlling. Once again relying on Judge Carter's opinion in Eramdjian, the Court noted that the statute does not by its terms require a wilful violation of the statute; that the statute creates a crime mala prohibita and not malum in se, and hence is that type of legislative enactment described in Morissette as that "now familiar type of legislation whereby penalties serve as effective means of regulation" and which "dispenses with the conventional requirement for criminal conduct - awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." When dealing with narcotics and their regulation the Court felt that the same "larger good" found sufficient by the Supreme Court in Morissette must be considered paramount here.

In alleging error on the part of the trial court in refusing to permit evidence of lack of knowledge of the statute, defendants relied on the recent Supreme Court decision in Lambert v. United States, 1957, 355 U.S. 225. In that case, defendant was convicted of failing to register under a California statute requiring a convicted felon to register with the Chief of Police if he were to remain in Los Angeles for more than five days. The Supreme Court reversed the conviction for the reason that defendant's conduct was without knowledge of the law.

In disposing of this contention the Court of Appeals distinguished the ruling in Lambert, holding it not applicable to the registration

provisions of 18 U.S.C. 1407 for the reasons that (1) unlike Lambert there was no mere nonfeasance on the part of Reyes and Perez but rather misfeasance, i.e., crossing the border in an unlawful manner (2) even if their failure to register could be considered to be a mere failure to act, such failure plus the planned departure was "under circumstances that should alert the doer to the consequence of his deed," i.e., a border crossing, particularly in the case of narcotic violators and addicts "alerts the doer" and is attended by circumstances which "move one to inquire as to the necessity of registration" and (3) the instant statute, unlike that in Lambert, is not a mere convenient aid to police department's book-keeping but its primary purpose, as expressed in its preamble and from a logical consideration of the problem, is to reduce and control the amount of illegal narcotics crossing the border by checking carefully the person and possessions of those most likely to be importing the drugs.

Staff: United States Attorney Laughlin E. Waters
(S.D. Calif.)

DENATURALIZATION

Absence of "Good Cause" Affidavit; Motion to Reopen Judgment.
United States v. Bartolo Failla (D. N.J., July 18, 1958). When the complaint was filed in this denaturalization suit in 1953, the "good cause" affidavit was not appended and was filed belatedly in 1956. The government's right to maintain the action without such affidavit was not contested either by motion addressed to the complaint or by way of defense in the answer. After trial on the merits, judgment was entered in favor of the government in December, 1957. There was no appeal. Following the Supreme Court's ruling in the Matles and companion cases, 356 U.S. 256, that the affidavit must be filed with the complaint, defendant filed a motion in the District Court under Rule 60(b), F.R.C.P. to vacate the judgment as void for want of jurisdiction.

The motion was denied in a long and well-reasoned opinion by Judge Wortendyke. The Court pointed out that it had jurisdiction over the subject matter under 8 U.S.C. 1451(a) and over the parties. Defendant, by failing to attack the complaint by motion or plea, was held to have waived the defense of the untimely filing of the affidavit. Noting that none of the relevant Supreme Court decisions had treated the statutory affidavit requirement as a condition precedent to the acquisition of jurisdiction, the Court concluded that the judgment against defendant is not void and is res judicata between the parties. The Court also decided there was no basis for action under Rule 60(b)(6), which authorizes a trial court to relieve a party from a final judgment for "any . . . reason justifying relief from the operation of the judgment."

Staff: United States Attorney Chester A. Weidenburner;
Assistant United States Attorney Charles H. Hoens, Jr.
(D. N.J.)

HANDBOOK FOR JURORS

Use of Handbook Upheld and Recommended. In United States v. Allied Stevedoring Corp., et al., 27 U. S. L. Week 2039 (C.A. 2, July 11, 1958, Clark, C. J.), the Court affirmed, inter alia, the denial of a motion for new trial based on the recent discovery that one of the jurors involved in the original conviction possessed and utilized "A Handbook for Petit Jurors" previously issued to him by the Clerk of the United States District Court. The juror could not remember whether or not he had produced the handbook in the jury room after the court delivered its instructions but he did recall that he made reference to the information in the book when the jury was discussing its power to recommend leniency. However, the jurors did not rely on the information given them by the juror but asked the court for a special instruction concerning the propriety of recommending leniency. Under these circumstances the Court stated the defendants did not show any grounds for relief even if the handbook is considered as a deprivation of the right to a fair trial.

The Court then considered the propriety of the book itself and stated it concurred in the excellent discussion upholding the value of the book and the constitutionality of its use which is set forth in the concurring opinion of Chief Judge Duffy in United States v. Gordon (C.A. 7), 253 F. 2d 177, 185. Reference was also made to the opinion of Chief Judge Simon in Horton v. United States, 26 U. S. L. Week 2651 (C.A. 6, June 12, 1958), reported in the Bulletin of July 3, 1958 (Vol. 6, No. 14, p. 404). While noting that many persons seem to believe they have a constitutional right to an ignorant jury uninformed as to their function, the Court stated it knew of nothing that requires such ignorance as a condition of a fair trial.

Judge Clark after giving a brief outline of the contents of the Handbook stated: "The whole book is so obviously a general explanation of courtroom procedure aimed at aiding a layman unfamiliar with judicial proceedings to grasp the nature of his function as a juror that we cannot avoid surprise at the kind of controversy and alarm exemplified in the dissenting opinions in the Gordon case. We find nothing improper in the use of the Handbook. In fact we believe that it accomplishes a necessary purpose and that its use should be encouraged."

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

NATURALIZATION

Petition Filed by Citizen Parent; Requirements at Time of Filing Petition and at Time of Naturalization. Petition of Apilado, (Fifth Circuit Court, Hawaii, July 17, 1958). Petition for naturalization under section 322 of Immigration and Nationality Act which permits citizen parent to file petition on behalf of his child under 18 residing with him.

In this case the petition was filed on January 8, 1958 by the citizen parent on behalf of his daughter who will not become 18 years of age until September 27, 1959. At the time of filing the daughter resided with her father and was unmarried. On March 8, 1958 however she was married and since that time has lived with her husband.

The Court pointed out that the daughter was no longer a "child" as that term is defined in section 101(c)(1) of the Act since she was now married. The Court observed that under the statute the qualifying elements to be met at the time of petitioning for naturalization include (1) that the child be the natural child of the petitioning parent and (2) that one or both of the parents must be citizens of the United States. These requirements were present at the time of the filing of the petition. The Court held, however, that at the time of naturalization the beneficiary under the petition must be a "child" within the meaning of the statute. The beneficiary in this case cannot be naturalized even though under the age of 18 since she is married and therefore is no longer a "child". Further, she is not residing with the citizen parent who filed the petition but in fact has been residing with her husband since their marriage on March 8, 1958.

Since the beneficiary no longer meets the requirements of section 322 of the Act, the petition on her behalf was denied.

* * *

INTERNAL SECURITY DIVISION

Acting Assistant Attorney General J. Walter Yeagley

Contempt of Congress. United States v. Arthur Miller (C.A. D.C.)
 On August 7, 1958, the full nine-judge bench of the Court of Appeals reversed, in a per curiam opinion, the contempt of Congress conviction of Arthur Miller. Miller was cited by the House of Representatives on July 25, 1956, indicted on February 18, 1957 in the District of Columbia, and convicted on May 31, 1957. On June 28, 1957, Judge Charles McLaughlin reconsidered his verdict of guilty in the light of Watkins and modified his verdict of guilty on two counts filed on May 31, 1957 to guilty on Count 1 and not guilty on Count 2 of a two count indictment. The opinion of the Court of Appeals based its holding on the opinion of the Supreme Court in Quinn v. United States, 349 U.S. 155, which held that unless the witness is clearly apprised that the committee demands his answer notwithstanding his objection, there can be no conviction under section 192. The Court of Appeals held that Miller was not unequivocally directed to answer a question about other persons present at a meeting of "Communist writers" in 1947. At the time of the hearing the committee was looking into the use of passports by alleged Communists.

Staff: United States Attorney Oliver Gasch; Assistant United States Attorney William Hitz (D. D.C.)

Contempt of Congress. United States v. Frank Grumman; United States v. Bernard Silber (D.C.) On August 4, 1958, a Federal Grand Jury returned indictments against Frank Grumman and Bernard Silber charging them in separate four count indictments with contempt of Congress (2 U.S.C. 192). In the summer of 1957 Grumman and Silber appeared before the House Committee on Un-American Activities which was conducting an inquiry into the Communist Party penetration of communication facilities, and refused to answer certain questions.

Staff: United States Attorney Oliver Gasch; Assistant United States Attorney William Hitz (D.C.)

Smith Act; Conspiracy to Violate. United States v. Trachtenberg, et al. (C.A. 2) In an opinion handed down on August 4, 1958, the Court of Appeals reversed the convictions of the six second string National Communist Party leaders who were convicted on July 31, 1956 (See U.S. Attorneys Bulletins Vol. 4, No. 17, page 558; No. 20, page 642). Circuit Judge Leonard Moore concurred in the opinion but dissented on the dismissal of the indictments. The Circuit Court based its decision on the authority of Yates v. U.S., 354 U.S. 298 and its own decision in U.S. v. Silverman, 248 F. 2d 671, cert. den. 355 U.S. 942, stating that the Smith Act does not proscribe abstractly preaching the propriety and desirability of the forcible overthrow of the government but reaches

only an advocacy and teaching of action to accomplish such overthrow by force and violence. The Court stated that its examination of the evidence indicated that it was insufficient to meet this "call to action" test.

Staff: United States Attorney Paul W. Williams; Assistant United States Attorneys Norton S. Robson, William S. Ellis, Renee J. Ginsberg and John A. Guzzeta (S.D. N.Y.)

Suits Against the Government. Edgar W. Graham v. Alfred C. Richmond (D.C.) Plaintiff in this case sought an order requiring the Commandant of the Coast Guard to deliver to him a specially validated document entitling him to go aboard and work on vessels of the United States Merchant Marine for which he had applied (See U.S. Attorneys Bulletin Vol. 6, No. 11, page 305). On July 23, 1958, the Court granted the government's motion for summary judgment, holding that the Commandant of the Coast Guard under the Magnuson Act (50 U.S.C. 191, 192, 194) had legal authority to include interrogatories dealing with possible Communist affiliations in the application for a merchant mariner's specially validated document, and that such interrogatories were pertinent, since the Commandant under pertinent regulations and Executive Order 10173, as amended, was required to determine before issuing such document whether the applicant's character and habits of life were such as to warrant the belief that his presence aboard vessels would not be inimical to the security of the United States.

Staff: Oran H. Waterman, Cecil R. Heflin, Homer H. Kirby, Jr. (Internal Security Division)

Trading With the Enemy Act. U.S. v. Oscar Wagman (S.D. N.Y.) On July 17, 1958, a two count indictment was returned against Oscar Wagman charging him with violating 50 U.S.C. App. 5(b) and the rules and regulations issued thereunder (31 C.F.R. 500.101 et seq.) and conspiring to violate the same provisions by engaging in certain commercial transactions involving hog bristles, which originated in Communist China, without the authorization of the Secretary of Treasury. An official of a Canadian firm was named as a co-conspirator but not defendant. The indictment was sealed by the Court. On July 25, 1958, the indictment was unsealed and the case placed on the calendar for pleading on August 1, 1958.

Staff: United States Attorney Arthur H. Christy; Assistant United States Attorney Anthony R. Palermo (S.D. N.Y.)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Severance Damages. Cole Investment Co. v. United States (C.A. 9). This Appeal raised the single question of whether the district court properly excluded an offer of proof of severance damages. The Court of Appeals stated a two-fold test for determining whether a claimant whose lands have been condemned is entitled to severance damages. The first test was stated as being "Is the part that is purportedly 'severed' one part of an integrated whole, the other part or parts being those actually condemned?" The second test was stated as being "that the market value of that which is 'severed' must have been decreased." The Court of Appeals concluded that appellant clearly failed to meet the test that would entitle it to severance damages because (1) there was no showing at any time that there was a unified use between the two tracts but, at most, only an offer to show a planned unity of use; and (2) there was no claim that the fair market value of the land remaining was decreased. Accordingly, the judgment of the district court was affirmed.

Staff: Harold S. Harrison (Lands Division)

"Wherry" Housing; Declaration of Taking Act; Non-existence of Purported Bad Faith Exception to Rule of Finality of Administrative Estimate of Just Compensation. In Re: United States of America Praying for a Writ of Mandamus or Writ of Prohibition (C.A. 5). The United States acquired by condemnation the interest of two corporate lessees in so-called "Wherry" housing. A declaration of taking was filed and estimated just compensation totaling \$100,000 deposited in court. Possession was sought to be delivered on January 31, 1958. The two corporations moved to vacate the declaration of taking and to prevent the entry of an order of possession alleging that the estimate of just compensation was arbitrarily and capriciously arrived at and was so inadequate as to constitute the perpetration of a fraud on defendants. The district court declined to enter an order of possession and defendants then moved to dismiss the complaint and to vacate the declaration of taking. Based upon an independent fair market value appraisal, the government filed an amended declaration of taking and increased the deposit for estimated just compensation to \$400,500. Defendants' motions to vacate and to dismiss were repeated. The motion to dismiss was denied but, expressing the view that the amount deposited was not arrived at in good faith, the district court entered an order purporting to vacate the declaration of taking and allowing the government 60 days in which to file an amended declaration of taking. The United States then filed in the Court of Appeals an application for leave to file petition for writ of mandamus or prohibition, accompanying that application with an appropriate petition and brief in support thereof.

Leave to file was granted and the Court of Appeals subsequently held that the order purporting to vacate the declaration of taking was erroneous

and could not stand. Concerning the mandamus petition, the Court stated, inter alia: " * * * the order granting defendant's motion to vacate the declaration of taking presents a perfect case for relief by mandamus, since it was not the function, and it was beyond the power, of the court to make such an order, and therefore no question of the use or abuse of discretion is presented. * * *" With reference to the alleged bad faith, the Court stated, inter alia:

* * * we deem the settled law to be that the purported bad faith exception to the rule of finality of the administrative estimate of just compensation does not exist, that, in short, the courts have no jurisdiction to review the amount of estimated compensation, none to set aside or vacate a declaration of taking, none to refuse a declaration of possession on the grounds asserted here. If the law were otherwise, a district judge, under the guise of determining whether the declaration of taking was in good faith and the amount tendered sufficient to escape the charge that it was arbitrary or fraudulent, could superintend the whole act of taking, vesting title, and acquiring possession, and thereby prevent its accomplishment unless the amount estimated measured up to his idea of what that amount should be. This court, in United States v. 6.74 Acres of Land, supra /148 F.2d 618/, has held precisely to the contrary. Cf. Berman v. Parker, 348 U.S. 26 and Starr v. Nashville, 354 U.S. 916.

The Court thereafter took occasion to state expressly that "Congress plainly gave the acquiring authority, not the courts, the function of estimating just compensation for this purpose."

Staff: Roger P. Marquis and Harold S. Harrison (Lands Division)

Condemnation; Jury View; No Prejudicial Error in Government Attorney Riding With Jury in Absence of Condemnee's Attorney; No Error in References to Purchase Price Six Years Before Taking. Webb v. United States (C.A. 4). In this condemnation case the government attorney rode with the jury in a bus to view the property. Because of some misunderstanding the condemnee's attorneys missed the bus but met the jury at the property. For their own convenience they declined to ride with the jury on the return trip. The Court held that there was no substantial ground for complaining of the conduct of the government attorney or for assuming that he misused his opportunity to confer with the jury. The Court also held that, under the circumstances of the case, there was no prejudicial error committed in references to the cost of the property more than six years prior to the taking.

Staff: Assistant United States Attorney Martin A. Ferris, III
(D. Md.)

* * *

T A X D I V I S I O N

Assistant Attorney General Charles K. Rice

I M P O R T A N T N O T I C E

Filing of Complaint to Toll Statute of Limitations in Criminal Tax Fraud Cases; Sections 3747(a) and 6531 of 1939 and 1954 Revenue Codes, Respectively.

The recent decision of the Supreme Court in Giordenello v. United States, _____ U.S. _____, 26 Law Week, No. 51, page 4494, reported in the July 18, 1958, Bulletin (Vol. 6, No. 15, page 464), poses a serious problem with respect to the complaint procedure as heretofore utilized in tolling the statute of limitations in criminal tax fraud cases. (See: United States Attorneys' Manual, Title 4:45; Trial of Criminal Income Tax Cases, pp. 70-71.)

Since it is somewhat uncertain whether the rationale of the Giordenello case is applicable to complaints filed in criminal tax fraud cases (there are distinguishing features between Giordenello and the usual tax fraud case), it has been concluded that in the future precaution should be exercised to insure a finding of probable cause by the Commissioner based on something in addition to the complaint as presently modeled in Form No. 1 of the Department's revised blank indictment and information forms. In view of the language of Rule 4, F.R.C.P., stating in part, "If it appears from the complaint that there is probable cause . . ." (emphasis added), it has been determined that the best method of insuring the adequacy of future complaints filed in tax fraud cases is to include in the complaint or append thereto an affidavit by the complaining officer, the Special Agent, setting forth briefly the facts upon which he relies to establish the allegations in the complaint, including the fact that he is the person who conducted the investigation and who has personal knowledge of the allegations.

Revision of Form No. 1 of the Department's blank indictment and information forms in implementation of the foregoing is presently being considered.

In the event any defendant in a pending tax fraud case involving the use of the complaint procedure moves for dismissal of the first count of the indictment (as a general rule and for obvious reasons only the first count will be involved), the United States Attorney concerned should immediately transmit to the Tax Division a copy of the motion and a copy of the complaint, together with a detailed description of the circumstances surrounding the filing of the complaint, in particular the discussions, if any, which ensued between the Commissioner and the complaining officer. This will enable the Tax Division to advise and assist the United States Attorney concerning the most favorable line of resistance to the particular motion, depending on the facts.

CRIMINAL TAX MATTERS
District Court Decision

Income Tax Evasion; Whether Offense of Wilful Attempted Evasion of Tax by Filing False Return Necessarily Includes Offense of Wilfully Failing to Supply Information. United States v. McCue, 160 F. Supp. 595 (D. Conn.). This case holds that the misdemeanor of wilfully failing to supply information (Section 145(a) of 1939 Code and 7203 of 1954 Code) is an "offense necessarily included" in the felony of wilfully attempting to evade an income tax by filing a false return, within the meaning of Rule 31(c), F.R. Crim. P. It is the Department's position that the decision is clearly erroneous and no significances should be attached to the fact that the Department has reluctantly concluded that no appeal will be taken.

Defendant was indicted for wilfully attempting to evade his income taxes by filing false and fraudulent returns for two years, in violation of Section 145(b) of the Internal Revenue Code of 1939. He pled nolo contendere to Section 145(a) on the theory that it was a lesser offense necessarily included in the 145(b) felony charges laid in the indictment. Defendant was fined \$20,000 and placed on probation for two years. Later the government sought unsuccessfully to vacate the 145(a) conviction on the ground that the court was without jurisdiction. In denying the government's motion the district judge wrote a lengthy opinion holding that the failure to supply information proscribed by Section 145(a) is an offense necessarily included in that charged in the indictment because it is impossible to commit the greater offense without supplying incorrect information, i.e., failing to supply correct information.

United States Attorneys are requested to urge, when called upon to do so, that the holding is clearly erroneous. The rule of lesser included offenses has its application "where the legislature has defined two distinct offenses, but one offense requires proof of all the facts or elements necessary to establish the other, plus something more--in other words, a greater offense including a lesser." Ekberg v. United States, 167 F. 2d 380, 385 (C.A. 1). Cf. Berra v. United States, 351 U.S. 131, 133-134. For example, a defendant charged with murder may be convicted of manslaughter if the jury finds an absence of malice. Stevenson v. United States, 162 U.S. 313, 315-316, 321-323. In the instant case there is no such gradation of offenses. The acts of omission made misdemeanors by Section 145(a) are not necessarily included in the offense charged but are separate offenses, distinct in law. To make out the felony of attempted evasion it is necessary to prove an act of commission, i.e., the existence of a tax liability and some affirmative act done in a wilful attempt to evade or defeat it. Spies v. United States, 317 U.S. 492. To make out the misdemeanor it is necessary to show an act of omission--a wilful failure to do a certain thing required by the statute or regulations. In short, the wilful filing of a false return in an attempt to evade the tax cannot be regarded as a mere failure to supply correct information under any view of the evidence in a 145(b) case. It follows that requests for 145(a) lesser included offense instructions to the jury should be stoutly resisted.

As for offers of a plea, it has been the Department's policy for many years to insist that in a 145(b) case the defendant plead guilty to at least one major, i.e., felony, count before the government will agree to dismiss the remaining counts.

CIVIL TAX MATTERS
Appellate Decisions

Injunction Denied in Absence of Exceptional and Unusual Circumstances.
United States and Laurie W. Tomlinson, Director v. Edward William Curd
(C.A. 5, June 30, 1958). Taxpayer filed his 1942 return on March 15, 1943 and paid one-half of the tax in equal installments in March and June, 1943. Thereafter, after passage of the Current Tax Payment Act of 1943, the balance was recorded on the Collector's books as forgiven pursuant to Section 6 of the 1943 Act. In 1952 the Commissioner assessed additional taxes and fraud penalties against taxpayer for all years 1941 through 1952, including 1942, which taxpayer promptly paid. Later, and after the regular statute of limitations against assessment for 1942 had run, the Commissioner reassessed the unpaid 1942 liability, with interest, and distrained on Florida real property of taxpayer to satisfy the assessment. Taxpayer brought the action to enjoin distraint and collection of that assessment for 1952 (later denied by the district court) on the ground that the assessments in question were jeopardy assessments and collection was prohibited by Section 272(a) of the 1939 Code because the Commissioner had not issued statutory deficiency notices. After certain preliminary proceedings and a prior appeal to the Court of Appeals which was remanded by stipulation, all of which are immaterial to the issue decided on this appeal, taxpayer amended his complaint to raise the statute of limitations as a ground of injunctive relief against the collection of the 1942 tax. The District Court dismissed the complaint as to 1952 but permanently enjoined collection of the unpaid 1942 tax on the ground that the statute of limitations had run. In reversing the district court, the Court of Appeals held (1) that the amount of 1942 tax originally forgiven under the statute and reassessed due to fraud, was not a "deficiency" requiring issuance of a statutory notice, which would permit injunction to be under Section 272(a) of the 1939 Code, and (2) that the alleged bar of the statute of limitations was not an exceptional and unusual circumstance which would permit injunctive relief.

Staff: Fred E. Youngman and C. Guy Tadlock (Tax Division)

Statute of Limitations; Suit to Collect Taxes Barred as Untimely.
United States v. J. E. Stone, et al. (C.A. 5, June 30, 1958). For 1947 J. E. Stone and his wife, Mary, residents of Texas, filed separate returns on the community property basis and for subsequent years filed joint returns. This suit was brought to collect taxes assessed on the returns for 1947, 1949 and 1950, and to foreclose liens on the taxpayers' homestead. The district court gave judgment for the United States on all counts except as to Mary Stone for 1947. As to that count the district court entered judgment against the United States on the ground that the suit was not timely filed. The taxes were assessed in September, 1949, and the original complaint was filed July 26, 1955, within the six-year period. The complaint named J. E. Stone, Mary Stone, and others claiming an interest in the property as defendants. On August 16, 1955, J. E. Stone filed in his own behalf a motion to dismiss, an alternative plea in abatement, and an answer, the latter disclosing for the first time so far

as the record shows that Mary Stone had died. On September 2, 1955, J. E. Stone, as community survivor, filed an answer of the Estate of Mary Stone, deceased, adopting in its entirety the pleadings of J. E. Stone in the case. Mary Stone had died testate on February 25, 1952, and her will admitted to probate on August 24, 1953, but at the time the Government's original complaint was filed executors had not been appointed and qualified. The executors named in her will were appointed and qualified on March 4, 1957, and on April 27, 1957, after expiration of the six-year period from date of assessment for bringing suit, the United States filed an amended complaint including the heirs and personal representatives of Mary Stone as defendants. The contention of the government on appeal was that the filing of the original complaint constituted the timely commencement of an action to collect the taxes assessed against Mary Stone, that J. E. Stone, as community survivor, was proper party under the circumstances to represent the estate of Mary Stone, and that the filing of the amended complaint related back to the filing of the original complaint. The Court, however, affirmed the district court.

Staff: Fred E. Youngman (Tax Division)

Court of Claims Decisions

Deduction of Legal Expenses; Amounts Paid Attorney for Unsuccessfully Defending Taxpayer for Income Tax Evasion Not Deductible from Gross Income. Walter W. Port and Alice A. Port v. United States (C. Cls.). Taxpayer paid some \$20,000 to an attorney for the unsuccessful defense of a criminal prosecution for income tax evasion under Section 145(b) of the Internal Revenue Code of 1939. In this suit, taxpayer claimed that the attorney's fee so expended was deductible from gross income either as a business expense or as an expense for the preservation of property held for the production of income. The main argument advanced by taxpayer to justify the deduction of the attorney's fee as a business expense was that he was a licensed physician in the State of California and that conviction of income tax evasion could lead to a revocation of his license to practice medicine. However, the Court held, as contended by the government, that the legal expenses proximately resulted from, and were directly connected with, taxpayer's wrongful acts and therefore were nondeductible personal expenses. Taxpayer's argument that the legal expenses were incurred for the preservation of property held for the production of income was rejected on the same reasoning.

Although both the taxpayer and the government had argued the question of whether or not the allowance of the deduction would frustrate the public policy embodied in the revenue laws and in Section 145(b), the Court did not reach that argument in its opinion because of the above-mentioned disposition.

Staff: Robert Livingston (Tax Division)

Federal Income Tax; Capital Gain Denied on Sale of Annuity Contract. Eugene J. Arnfeld et al. v. United States, (C. Cls., July 16, 1958). The

issue presented was whether the increment realized by taxpayer upon the sale of an annuity contract prior to its maturity constitutes ordinary income or capital gain.

Taxpayer urged that the annuity contract involved was a capital asset and that its assignment three days before maturity was a bona fide "sale or exchange" of property under Section 117(a)(4) of the Internal Revenue Code of 1939.

The government's position was based on two contentions. First, that the so-called "sale" of the annuity contract was not bona fide since the buyer of the contract was acting as an agent of the taxpayer and was no more than a conduit through which the form of a sale took place. Secondly, even if the sale was bona fide, the government contended that the gain on the transaction still represented ordinary income which could not be converted into capital gain by an anticipatory arrangement.

In holding for the government, the Court stated that although it believed the sale to be bona fide, the increment in value of the contract increased at a fixed rate and therefore amounted to ordinary income. Since the taxpayer would have received ordinary income had she surrendered the contract at maturity, the Court held that the realized gain should not be accorded capital gain treatment, thus following the cases which say that a taxpayer cannot assign future income to another in order to escape tax on that income.

Staff: David R. Frazer (Tax Division)

State Court Decision

Tax Lien; Priorities; Judgment Creditor; Taxpayer's Property Possession of Third Party; Ineffective Service of Notice of Garnishment. C. Rallo Contracting Company, Inc. v. Thomas J. Blong and Thomas J. Blong, Jr., d/b/a Thomas J. Blong Painting Company, et al., St. Louis Court of Appeals. A private judgment was obtained against taxpayer who was indebted to the United States for withholding taxes. Execution was issued on the judgment and a notice of garnishment was delivered by the sheriff to the bookkeeper in the office of a corporation which held funds belonging to taxpayer. No officer of the corporation was present at the time. Several days thereafter, the government's notices of tax lien were filed.

The issue in the case was the question of priority as between the tax lien of the United States and the claim of the judgment creditor of the taxpayer. The sufficiency of the service of the notice of garnishment under the state statute was dispositive of the issue. The statute is, in part:

Notice of garnishment shall be served on a corporation, in writing, by delivering such notice, or a copy thereof, to the president, secretary, treasurer, cashier or other chief or managing officer of such corporation;

The St. Louis Court of Appeals, affirming the Circuit Court, City of St. Louis, held that the service of the notice of garnishment on the bookkeeper was not service on an officer of the corporation under state law. It was ineffective therefore to confer jurisdiction over the indebtedness owed by the corporation to the taxpayer. Under the circumstances, the judgment creditor could not acquire a valid lien against the indebtedness that was superior to the government's lien for taxes.

Staff: United States Attorney Harry Richards and
Assistant United States Attorney Robert E. Brauer
(E.D. Mo.); Leon F. Cooper (Tax Division)

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