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March 22, 1963

# United States

# DEPARTMENT OF JUSTICE

Vol. 11 No. 6

# UNITED STATES ATTORNEYS

# BULLETIN

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Vol. 11 March 22, 1963 No. 6


## IMPORTANT NOTICE TO UNITED STATES ATTORNEYS

Court Reporting - Necessity of Recording Proceedings in Full. In the May 8, 1959, issue of the United States Attorneys Bulletin (Vol. 7, No. 10, p. 286) attention was directed to the requirement of 28 U.S.C. 753(b) that court reporters shall record verbatim by shorthand or by mechanical means "all proceedings in criminal cases had in open court". (See also U. S. Attorneys Manual, Title 8, pp. 130.1 and 131.) However, cases continue to arise in which this statutory requirement has not been observed.

On February 8, 1963, the Court of Appeals for the Tenth Circuit reversed the case of Parrott v. United States on the ground that no stenographic record of the voir dire examination was made. The Court said that the provision of 28 U.S.C. 753(b) "is mandatory and the court has the duty to require compliance".

On February 18, 1963, the Court of Appeals for the Ninth Circuit vacated the judgment and remanded for hearing the case of Brown v. United States to determine whether the appellant was prejudiced by the failure of the reporter to record the closing arguments of counsel.

In Fowler v. United States, 310 F. 2d 66 (1962), the Court of Appeals for the Fifth Circuit added a third case to its previous rulings giving a literal and mandatory interpretation to 28 U.S.C. 753(b). The Court held that without a transcript of the arguments of counsel it could not determine whether the Government's argument contained such prejudicial comment as to require reversal, and a new trial was ordered. The same Circuit in Stansbury v. United States, 219 F. 2d 165, fn. 6 at page 169 (1955), stated that the requirements of Section 753(b) apparently cannot be waived. The question arose upon failure of the court reporter to record a conversation between the United States Attorney and the judge which took place at the bench. In another case, Stephens v. United States, 289 F. 2d 309 (C.A. 5, 1961), it held to be reversible error for the trial court not to require observance of all the terms of Section 753(b) since "The Act is mandatory in its requirements . . .". The question arose in that case from failure to furnish defendant with a transcript of the examination of the veniremen and the argument of counsel.

The Court of Appeals for the Fourth Circuit in United States v. Taylor, 303 F. 2d 165 (1962), decided that although failure to comply with 28 U.S.C. 753(b) is not of itself error sufficient to require allowance of a motion to vacate a sentence, it is a matter which may properly be considered in a collateral proceeding to determine whether a defendant is entitled to a hearing on such a motion. Citing Stephens v. United States, supra, the Court stressed the importance of compliance with Section 753(b) and interpreted it not only as a safeguard for defendants but also as protection for the courts from the "infirmities of human error".

It should be noted that the statute refers initially only to the recording of proceedings in criminal cases. The obvious purpose of the statute is to have a record of such proceedings made and preserved. With the exception of "pleas and proceedings in connection with the imposition of sentence . . . and such other parts of the record of proceedings as may be required by rule or order of court", which must in all cases be transcribed, the reporter is required to transcribe only such parts of the record as may be ordered by the judge or the parties. Ordinarily of course, such transcripts are prepared for purposes of appeal. But it is also important that a verbatim shorthand record be available in the event of a later collateral attack upon some phase of the proceedings. Questions sometimes arise with respect to the appointment, retention or waiver of counsel, the empanelling of a jury, the competence of jurors and other matters preliminary to the actual opening of a trial. Intelligent and informed appellate or other later consideration of such questions necessitates examination of a true record of the proceedings involved. It is the purpose of the statute to assure that a record is available for transcription as an aid in deciding such questions.

As pointed out in the Bulletin item of May 8, 1959, failure to record every word of the proceedings places the Government at a serious disadvantage in meeting claims of alleged error on appeal. Therefore, in districts where it is the practice not to record the proceedings in full, United States Attorneys should make application to the Court to take such corrective measures as may be necessary to assure compliance with the statutory requirement.

## DISTRICTS IN CURRENT STATUS

As of January 31, 1963, the districts meeting standards of currency were:

### CASES

### Criminal

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

## CASES

### Civil

| | | | | |
|---|---|---|---|---|
| Ala., N. | Ind., S. | N.J. | P.R. | Va., W. |
| Alaska | Iowa, S. | N. Mex. | S.C., W. | Wash., E. |
| Ariz. | Ky., E. | N.Y., E. | S.D. | Wash., W. |
| Ark., E. | Ky., W. | N.C., M. | Tenn., E. | W. Va., N. |
| Ark., W. | La., W. | N.C., W. | Tenn., W. | W. Va., S. |
| Calif., S. | Mich., E. | Ohio, N. | Tex., N. | Wis., E. |
| Colo. | Minn. | Okla., N. | Tex., E. | Wyo. |
| Dist. of Col. | Miss., N. | Okla., E. | Tex., S. | C.Z. |
| Fla., M. | Mo., E. | Okla., W. | Tex., W. | Guam |
| Ga., N. | Mo., W. | Ore. | Utah | V.I. |
| Ga., S. | Neb. | Pa., M. | Vt. | |
| Hawaii | N.H. | Pa., W. | Va., E. | |

## MATTERS

### Criminal

| | | | | |
|---|---|---|---|---|
| Ala., N. | Idaho | Me. | Okla., N. | Utah |
| Ala., S. | Ill., N. | Md. | Okla., E. | Va., E. |
| Alaska | Ill., E. | Miss., S. | Okla., W. | Va., W. |
| Ariz. | Ill., S. | Mo., W. | Pa., W. | W. Va., N. |
| Ark., E. | Ind., N. | Mont. | R.I. | W. Va., S. |
| Ark., W. | Ind., S. | Neb | S.C., E. | Wis., W. |
| Calif., S. | Iowa, N. | N.H. | S.D. | Wyo. |
| Colo. | Iowa, S. | N.J. | Tenn., M. | V.I. |
| Dist. of Col. | Ky., E. | N.Y., W. | Tenn., W. | |
| Ga., S. | Ky., W. | N.C., M. | Tex., N. | |
| Hawaii | La., W. | Ohio, S. | Tex., S. | |

## MATTERS

### Civil

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

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# ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

## Memos and Orders

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 1, Vol. 11 dated January 11, 1963.

| MEMOS | DATED | DISTRIBUTION | SUBJECT |
|---|---|---|---|
| 335 | 1- 9-63 | U.S. Attorneys | Use of Forms in Condemnation Cases |
| 336 | 1-15-63 | U.S. Marshals | Determination of Veteran Preference; Deputy U.S. Marshal Applicants |
| 337 | 1-18-63 | U.S. Attorneys | Public Law 87-748, 76 Stat. 744, approved October 5, 1962 |
| 338 | 2-18-63 | U.S. Attorneys | Procedures to Follow in Foreclosures of Real Estate Projects Subject to FHA Mortgages |
| 339 | 2-19-63 | U.S. Attys & Marshals | Airline Penalties for No-Shows (Memo 233, Supps. 1 and 2) |
| 340 | 2-25-63 | U.S. Attys & Marshals | New Civil Defense Identification Cards |
| 325-S1 | 2-27-63 | U.S. Attys & Marshals | Supplemental Salary Table Covering Assistant U.S. Attorneys' Pay Rates |
| 340-S1 | 3-11-63 | U.S. Attys & Marshals | Civil Defense Identification Cards |
| 341 | 2-27-63 | U.S. Attys & Marshals | Travel and Subsistences Expenses For Income Tax Purposes |
| 343 | 2-27-63 | U.S. Attorneys | Rule 20 Transfer Cases (New Form USA-18) |

| ORDERS | DATED | DISTRIBUTION | SUBJECT |
|---|---|---|---|
| 291-62 | 12-13-62 | U.S. Attys & Marshals | Amendments to Title 28, Code of Federal Regulations, Particularly Part 0 Relating to Organization of Department of Justice (Order No. 271-62) |

| ORDERS | DATED | DISTRIBUTION | SUBJECT |
|---|---|---|---|
| 292-63 | 2-7-63 | U.S. Attys & Marshals | Designating John W. Douglas to Act as Assistant Attorney General in Charge of Civil Division |

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# ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Supreme Court Reverses District Court's Granting of Summary Judgment and Remands Case for Trial. White Motor Company v. United States (No. 54 - October Term, 1962). On March 11, 1963, the Supreme Court reversed a decision of the District Court for the Northern District of Ohio which had held, on the Government's motion for summary judgment, that certain features of White Motor Company's distribution system were per se illegal. The suit had been filed under Section 4 of the Sherman Act charging that White's agreements with its distributors and dealers violated Sections 1 and 3 of the Sherman Act. Stated broadly, the complaint alleged three violations of the Sherman Act: (1) that provisions in the dealer and distributor franchise agreements restricted the territory within which the distributors or dealers could resell White trucks; (2) that the franchise agreements contained restrictions on the persons or classes of persons to whom the distributors could sell; and (3) that the franchise agreements contained certain price fixing provisions.

The motion for summary judgment asserted and the District Court held that all three restraints were per se illegal. On direct appeal to the Supreme Court, White claimed that summary judgment was improperly granted as to the territorial and customer restrictions. No appeal was taken from the provisions of the District Court's decree which dealt with price fixing. The Supreme Court's opinion reversing the District Court was written by Mr. Justice Douglas joined by Justices Goldberg, Harlan, and Stewart. Mr. Justice Brennan filed a separate concurring opinion and Mr. Justice Clark, joined by the Chief Justice and Mr. Justice Black, dissented. Mr. Justice White took no part in the consideration of this case.

The majority opinion, specifically reserving any views on the merits of the underlying antitrust issues, holds "that the legality of the territorial and customer limitation should be determined only after trial". The opinion details the economic justification for these practices which White offered both in the court below and in its briefs in the Supreme Court. After discussing the well recognized categories of per se restraints such as price fixing or a horizontal division of territory, the Court concluded that a trial is necessary to determine whether or not the restraints contained in White's franchise agreements have "no purpose except the stifling of competition". The opinion points out that this is the first time that a vertical territorial restriction has been before the Court and states that a showing of the actual impact must be made before a conclusion can be reached. Seemingly, if a showing of anticompetitive purpose and effect can be made, a per se rule may yet be established for future cases involving restraints of this type.

The separate concurring opinion of Mr. Justice Brennan also contains a detailed discussion of possible justification for these restrictive

practices, and states the problem with respect to territorial allocations as "not simply whether some justification can be found, but whether the restraint so justified is more restrictive than necessary or excessively anticompetitive when viewed in light of extenuating interests". This language is a restatement of a rule of reason approach and precludes any application of the per se doctrine to this type of restriction. The opinion indicates, however, that it is less likely that the customer restrictions can be justified upon trial of this matter.

Mr. Justice Clark's dissent describes White's system of distribution as one of the "most brazen violations of the Sherman Act that I have experienced in a quarter of a century" and asserts that the arguments raised by White in the Supreme Court do not present an issue of fact requiring trial. The dissent characterizes the issues raised by White as economic arguments or assertions of business necessities which would have no bearing on the legal conclusion. The opinion concludes by pointing out that all the offered economic justifications represent a thesis contrary to the public policy expressed in the Sherman Act.

Staff: Robert B. Hummel and Michael I. Miller (Antitrust Division)

Court Grants Governments Motion For Preliminary Injunction In Merger Case. United States v. Ingersoll-Rand Company, et al. (W.D. Pa.). On February 14, 1963, the Department filed a Clayton Act Section 7 proceeding against the Ingersoll-Rand Company charging that its proposed acquisition of the stock of Lee-Norse Company and Galis Electric and Machine Company and certain of the mining machinery assets and business of Goodman Manufacturing Company may substantially lessen competition and tend to monopoly in the field of coal mining machinery and equipment. On March 6 the court granted a preliminary injunction enjoining defendants from consummating the merger or taking any steps in implementation thereof pending trial and adjudication on the merits, on the ground that evidence presented at the hearing on the motion during the period February 25 to March 1, 1963, inclusive, indicated that consummation may be within the prohibitions of Section 7. The parties are presently considering what action they will take in the circumstances.

The proposed acquisitions were announced in the press on or about December 5, 1962, and the Division inquired into the proposal under its Merger Program on the same day. Counsel for Ingersoll-Rand indicated that only informal conversations were taking place and promised to inform the Department when the conversations were to be implemented. Late in January the Division was informed that the merger was to go through as announced. Civil investigative demands at that point were directed to the four defendants, requesting pertinent information, and the Division's attempts to secure the assistance of competitors of the merging companies were augmented.

Subsequent to the receipt of the investigative demands the parties indicated a positive intent to go through with the merger in spite of the admonition of Division representatives that the proposal raised serious

questions under the antitrust laws. Under the agreements, copies of which were supplied pursuant to the investigative demands, the parties had the right to move forward or backward the proposed closing date of March 1.

In order to forestall any possibility of the parties consummating the merger prior to the institution of proceedings, the Government moved, concurrently with the filing of the complaint on February 14, for a temporary restraining order. The Court on the same day granted the order ex parte, enjoining consummation of the proposals for a 10-day period, and set the case down for hearing on the Government's motion for preliminary injunction for February 25.

On February 18 defendants moved to vacate the temporary restraining order on the ground that delay would constitute irreparable injury to them, and a hearing was had on their motion on February 21. The Court denied defendants' motion and indicated orally that defendants had failed to demonstrate injury. The court also pointed out that by this hearing the defendants had been given an opportunity to oppose the issuance of the temporary restraining order which they had requested.

Ingersoll-Rand is one of the Nation's largest manufacturers of general industrial machinery with very limited activities in the field of coal mining machinery. The three companies it proposed to acquire are engaged in the manufacture of various coal mining machinery products: Lee-Norse is the country's largest manufacturer of continuous miners, a machine costing between $60 thousand and $250 thousand and used for extracting coal from the face of the underground coal mines. In 1961 this company accounted for over 47% of industry sales of this product to coal mines in the United States; Goodman Manufacturing Company is also engaged in the manufacture of continuous miners doing about 13% of the nation's business in this field; in addition, Goodman manufactures a variety of other products in the field of coal mining machinery and equipment; Galis Electric and Machine Company is a smaller company engaged in the manufacture of roof and face drills, the only products not manufactured by the other companies involved. The complaint alleged that, as a result of the combination, Ingersoll-Rand would be in a position to offer a full line of machines and equipment used to extract coal from the face of the mine; that the combination of these companies may increase the relative size and diversification of Ingersoll-Rand to such a degree that its advantage over its competitors and other companies engaged in the production and sale of underground coal mining machinery and equipment threatens to be decisive; that actual and potential competition in this field will be eliminated; that the acquisitions would result in the elimination of three independent substantial factors in competition in the manufacture of products in this field, thereby bringing about an undue reduction in the small number of companies (six or eight) engaged in the fields of continuous miners and face coal mining machinery and equipment categories within the broader product line denominated underground coal mining machinery and equipment.

During the hearing on the Government's motion for preliminary injunction, the Government called as witnesses officials of five competing companies in the field of continuous miners and face coal mining machinery and equipment each of whom testified as to the probable adverse competitive impacts of the proposed acquisitions. Defendants urged that the merger, if consummated, would be of benefit to the coal mining industry and offered as witnesses coal mining operators and engineering and industry experts. Defendants called as witnesses officers of the defendant companies, coal operators, and economic consultants. The hearing was completed on March 1.

The proceeding is somewhat unique in that this is only the second time under the amended Section 7 that the Government has been successful in securing and retaining a temporary restraining order and a preliminary injunction prior to consummation of any of the implementing steps of a merger.

Throughout the proceeding defendants had urged that the court grant an order which would permit the companies to merge and be maintained as entities separate and apart from Ingersoll-Rand in a manner similar to that which the district court had permitted defendants to do in the Brown Shoe case. The Government strongly opposed this type of order and to date has been successful in resisting these efforts.

On March 11, 1963, defendants' motion to modify the Court's preliminary injunction order was heard. At its conclusion, Judge Rosenberg stated that defendants in their argument had advanced nothing which would change his thinking or the direction he intended to go in this proceeding, and indicated that a ruling on the motion would be issued within three days in the negative. Counsel for defendants stated that review of the Court's order would be sought promptly.

Staff: Donald F. Melchoir, John M. O'Donnell, P. Jay Flocken, Michael J. Freed, and Josef Futoran (Antitrust Division)

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# CIVIL DIVISION

Acting Assistant Attorney General John W. Douglas

## SUPREME COURT

### NATIONAL LABOR RELATIONS ACT

Coverage of National Labor Relations Act Does Not Extend to Labor Disputes on Foreign Flag Vessels Manned by Foreign Seamen. Frank W. McCulloch et al., Members, National Labor Relations Board v. Sociedad Nacional de Marineros de Honduras; Incres Steamship Company, Ltd. v. International Maritime Workers Union et al. (U.S. Sup. Ct., February 18, 1963). These cases all involved labor disputes on ships registered in and flying flags of foreign countries and manned by foreign seamen. However, the vessels were partly engaged in the foreign commerce of the United States and had other contacts with the United States. The issue was whether the National Labor Relations Act covered such labor disputes, thereby rendering them subject to the jurisdiction of the National Labor Relations Board.

The McCulloch case arose out of an attempt by an American labor union to organize the crews on several Honduran flag ships, which were manned by Honduran seamen, and operated by a Honduran corporation which, in turn, was a wholly-owned subsidiary of an American corporation. The vessels called regularly at ports in Honduras and in the United States, as well as ports in other countries. The officers and employees of the Honduran corporation were residents of Honduras, and the seamen were already members of a Honduran labor union. The N.L.R.B. assumed jurisdiction of the controversy and ordered a representation election to be held. The Board held that, since the ultimate ownership was American, and since the vessels were part of the integrated maritime operation of the American corporation, the vessels had substantial United States contacts, and this was sufficient to bring them within the coverage of the Labor Act. Separate suits were then filed in the United States District Court in New York and in the District of Columbia to enjoin the representation elections, and both Courts issued the sought injunctions, holding that the National Labor Relations Act did not extend to these labor controversies.

In the Incres case, an American union was engaged in the picketing for representation purposes of two Liberian flag cruise ships owned by Italian Nationals and manned by Italian seamen, but regularly engaged in commerce between New York and ports in the Caribbean. The lower New York state courts had enjoined the picketing, but the Court of Appeals of New York vacated the injunction on the ground that the dispute was "arguably" subject to the jurisdiction of the N.L.R.B.

The Supreme Court, in both cases, decided that the N.L.R.B. had no jurisdiction over the controversies, holding that the jurisdictional provisions of the National Labor Relations Act "do not extend to maritime operations of foreign flagships employing alien seamen." The Court pointed out that nothing in the language or legislative history of the Labor Act reflected a congressional intent to cover such labor disputes, but that the legislative history indicated that the Act was to be applicable only to working-men of this country. The Court

also relied upon the principle of international law that the law of the flag state ordinarily governs the internal affairs of a vessel, and pointed to the possible disruption in this country's foreign relations if American labor laws were to be applied to foreign vessels with foreign crews.

The Department of Justice took part in the case as an amicus curiae, urging that the N.L.R.B. had no jurisdiction over the matters involved.

Staff: Solicitor General Archibald Cox and Daniel M. Friedman (Office of the Solicitor General); John C. Eldridge (Civil Division)

## COURTS OF APPEALS

### ADMIRALTY

Pre-trial Order Fixing Liability Reversed and Remanded for Trial for Determination of Genuine Issues of Fact. Helen Mascuilli v. United States (C.A. 3, February 15, 1963). This action for wrongful death arose out of the death of a longshoreman who was killed while assisting in loading cargo aboard the USNS MARINE FIDDLER, a vessel owned and operated by the United States. The vessel was loading military tanks and the death occurred when a shackle attached to the loading gear parted, causing a vang to lash back and strike decedent. The libel alleged both unseaworthiness and negligence.

In the district court a pre-trial order resolved the issue of liability in favor of libelant and directed the trial to be restricted exclusively to the issue of damages. Judgment in the amount of $124,000 was decided at a subsequent trial on the issue of damages. The Government's appeal was premised on the grounds that the judge in his pre-trial order erred in summarily holding the United States liable, notwithstanding the existence of genuine issues of material fact, and in imposing liability without making specific findings of fact and conclusions of law as required by Admiralty Rule 46-1/2. The Government also contended that there can be no recovery for unseaworthiness under the Pennsylvania Wrongful Death Statute. The Court of Appeals held that the answers to interrogatories, and admitted facts from the unanswered requests for admissions of fact were not sufficient to dispose of genuine issues of fact as to how and what caused the shackle to part. The case was remanded for a new trial.

Staff: Alan Raywid (Civil Division)

### INTERSTATE COMMERCE COMMISSION

Interstate Commerce Commission Determination That Napalm-Filled Bomb Cases are "Incendiary Bombs" for Freight Classification Purposes Is Upheld. United States v. Interstate Commerce Commission and Western Pacific R. (C.A. D.C., February 21, 1963). This action was commenced by the United States to enjoin and set aside a determination by the Interstate Commerce Commission, made on referral from the Court of Claims, that the first-class rating on "incendiary bombs" in the pertinent freight classification was applicable to steel bomb bodies filled with napalm gel, a mixture of gasoline and napalm

thickener, when shipped without bursters, fuses and arming wires, and that the resulting rates were not unjust, unreasonable or otherwise unlawful. The district court dismissed the complaint, and the Court of Appeals affirmed.

The underlying litigation in the Court of Claims from which the question of reasonableness of rates was referred to the Commission has a long history. In 1956, the Supreme Court held in United States v. Western Pacific R., 352 U.S. 59, that the question of reasonableness of the rates on incendiary bombs as applied to the particular shipments was one for the primary jurisdiction of the Commission, because it was for the Commission to determine in the first instance the commercial reasons for the first-class rating on incendiary bombs and the extent to which those reasons were applicable to napalm-filled bomb bodies shipped without bursters, fuses and arming wires. The Court of Claims, upon remand, referred the question to the Commission, which held the first-class rates applicable and reasonable. The Court of Appeals has now rejected the Government's contentions that the Commission had failed to follow the standards laid down by the Supreme Court, and that it had been arbitrary in its determination of reasonableness when it applied to these non-explosive articles the first-class rating on articles covered by the Commission's regulations for the transportation of explosives and other dangerous articles. The Court, "giving deference to the expertise of the Commission in the exercise of its primary jurisdiction," affirmed the district court.

The Commission's decision on the referred question now goes to the Court of Claims for the Court's disposition of the railroads' claims.

Staff: Kathryn H. Baldwin (Civil Division)

## LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Injury Sustained on Way from Work to Home Held Compensable Where Employee Was Carrying Work Home and Had Been Performing Work at Home with Knowledge of Employer. American Mercury Insurance Co. v. Britton (C.A. D.C., February 21, 1963). This action was brought by an employer and its insurance carrier to set aside an award of death benefits made by the Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act as extended to private employment in the District of Columbia. Decedent, the claims manager for a local insurance company, died as a result of an injury sustained on his way home from his office with an attache case containing work which he intended to complete at his home. Decedent worked practically every evening both at his office and at his home, with the knowledge and approval of his employer who had not considered decedent's employment to be confined to normal office hours. The Deputy Commissioner awarded the widow death benefits on the ground that the injury occurred in the course of decedent's employment. In affirming the award, one judge dissenting, the Court of Appeals ruled that it was bound by the Deputy Commissioner's findings as to "course of employment" even though /this/ inference be considered more legal than factual in nature." The

Court recognized the general rule that injuries occurring to employees traveling to and from their regular place of work are not deemed to arise out of and in the course of their employment for workmen's compensation coverage purposes. However, in a very significant ruling, the Court accepted the Government's argument that the instant case constituted an exception to the rule because there was a consistent and recognized practice that some of the decedent's services were to be performed at his home. It further held that whether the agreement to do the work at home is express or implied by the course of business is not significant.

This decision significantly liberalizes the course of employment standard in L.W.C.A. cases. It may prove troublesome at a late date in F.E.C.A. and perhaps Tort Claims Act contexts.

Staff: Herbert P. Miller (Department of Labor) Morton Hollander and Edward A. Groobert (Civil Division)

## MILK MARKETING

Injunctive and Mandatory Relief Denied to Dairy Farmers Seeking Benefits of Boston Milk Marketing Order. Calhoun v. Freeman (C.A. D.C., February 21, 1963). Appellants, dairy farmers in New York States, who process, bottle, and distribute 78% of their milk in the New York milk marketing area, are producer-handlers under the New York order and, as such, do not qualify as "producers" whose milk is "pooled" or "priced" under the New York marketing order. They sell most of the remainder of their fluid milk to processors in the Boston milk marketing area. For several years they qualified as "producers" under the Boston order and their milk was "pooled" and "priced." Effective September 1, 1960, the Boston order was amended to change the definition of "producer" so as to exclude any one who is a "producer-handler under this or any other Federal order." Because of this amendment, appellants lost their status as "producers" under the Boston order, their milk is not regulated and they are no longer insured the uniform minimum price which the statute requires handlers to pay to their "producers."

Appellants brought suit in the district court to set aside the amendment and to compel the Secretary of Agriculture to treat them as "producers." The district court granted summary judgment for the Secretary on the ground that appellants, being completely unregulated, lacked standing to sue. The Court of Appeals, in a per curiam opinion, affirmed on the ground that, on the merits, appellants failed to show entitlement to the injunctive and mandatory relief requested. The Court said that "it would seem that a milk producer cannot resort to the court in an effort to place himself and his vendees under regulation. However, we need not pass on this point * * *."

Staff: Pauline B. Heller (Civil Division)

## OFFICIAL IMMUNITY

Federal Law Held to Govern Libel Suit Against Federal Official Based on Statements Made by Him in Official Internal Agency Report. Wozencraft v. Captiva (C.A. 5, March 6, 1963). Appellant, an employee of the Department of Interior, was discharged from the federal service because of statements concerning his work performance made by appellee, his immediate superior, in an official internal agency report. While the removal proceedings were pending, appellant brought this action for libel against appellee, charging that the statements were untrue and malicious. The district court entered summary judgment for appellee on the ground that the statements were privileged. On appeal, the Court of Appeals affirmed. It held that federal law governed the question of appellee's immunity from suit because the action involved the employment and discipline of a federal employee, and the related official actions of another federal employee. It further held that the statements were privileged, notwithstanding appellant's allegations of malice, citing, inter alia, Barr v. Matteo, 360 U.S. 564.

Staff: Edward A. Groobert (Civil Division)

## RIVER AND HARBOR ACT

Vessels Causing Injury to Coast Guard Navigational Aid Are Liable for Damages and Penalties Even Though Act Was Unintentional. United States v. Martin Oil Service, Inc. (C.A. 7, February 27, 1963). The United States brought this action against a tugboat and her tow under the River and Harbor Act of 1899, as amended, 33 U.S.C. 401-418, for statutory penalties and for the damages caused by the tow's collision with a Coast Guard light beacon. Section 408, among other things, makes it unlawful for any person to destroy a navigational aid, and Section 412 provides that any vessel "used or employed in violating any of the provisions of sections 407, 408, and 409" is liable for the damages done and for pecuniary penalties, and may be proceeded against by way of a libel. The principal defense was that the beacon had already been damaged prior to the collision, and thus the collision of the tow with the beacon did not cause the damage. The district court entered judgment for the United States, finding that the collision of the tow with the beacon was the cause of the damage, and holding that the statute imposed absolute liability on the vessels.

The Court of Appeals affirmed, holding that the district court's finding as to the cause of the damage was supported by substantial evidence. The Court of Appeals went on to point out that such vessels are liable to the United States for damages and statutory penalties, whether the navigational aid was damaged unintentionally or negligently. This is the second appellate court pronouncement on the absolute liability imposed by the Act on vessels used or employed in violating the statute, and the first reported case in which a court has assessed separate penalties against both the tug and her colliding tow.

Staff: Anthony W. Gross (Civil Division)

## SOCIAL SECURITY ACT

Written Lease Held Sufficient Arrangement for "Material Participation." Foster v. Celebrezze (C.A. 8, February 21, 1963). Appellant sought old-age insurance benefits under the Social Security Act, on the basis of certain farm rental income she received from leasing her farm out on crop shares. Under 42 U.S.C. 411(a)(1) such income is creditable under the Act if the landlord has an arrangement with his tenant contemplating "material participation" by the owner in the production of agricultural commodities on the land. The Secretary found that appellant's "arrangement" with her tenant did not satisfy the requirements of the statute and denied her application. Her arrangement consisted of a written farm lease which reserved to her the right to select the crops; direct the manner in which they were planted; approve the seed planted; designate fields upon which manure was to be spread; and decide whether to participate in Government farm programs. The district court, affirming the Secretary's decision, held that the lease only provided for the usual amount of landlord participation in the management activities by a crop share landlord and that Congress intended "to encompass only those [arrangements] which involve a substantial degree of landlord participation going considerably beyond the normal amount."

On appeal, the Court of Appeals reversed. The Court noted agreement with the district court's holding that "volunteer services or inspection on the part of the landlord in the absence of any arrangement therefor will not" satisfy the requirement of Section 211a. However, the Court held that the district court had placed a "qualification upon coverage not contemplated by the statute" in ruling that in order to satisfy the requirements of the statute an arrangement had to provide for more than the usual amount of participation commonly made by farm landlords. The Court went on to hold that an arrangement is sufficient if it provides for landlord activity of "substantial" character "regardless of whether many or few landlords" have such an arrangement. The Court decided that appellant had met the requirement of having an arrangement with her tenants for "material participation" since she had reserved "broad management powers * * * [and] managerial responsibilities which have a substantial effect upon production * * *."

Staff: Jerry C. Straus (Civil Division)

## UNITED STATES

United States Is Resident of Every State as Well as of United States. United States v. Whitcomb (C.A. 4, February 18, 1963). In this action the United States, having obtained a judgment against an uninsured Maryland resident arising out of a motor vehicle collision in Maryland, and the judgment proving uncollectible against the motorist, sought indemnification under the Maryland statute creating the Maryland Unsatisfied Claim and Judgment Fund Board. The Maryland law provides that "qualified persons," including governmental bodies, may recover unsatisfied judgments out of the Fund. A "qualified person," under the Maryland statute, includes one

who is "a resident" of Maryland. The district court held that the United States was not a "qualified person" and dismissed our claim. On appeal, the Court of Appeals reversed, holding that the United States as a sovereign is a resident of every state within the United States. Therefore, it is a resident of Maryland and entitled to recover unsatisfied judgments from the Fund.

Staff: Sherman L. Cohn (Civil Division)

DISTRICT COURTS

ADMIRALTY

Naval Vessel Held Solely at Fault as Burdened Vessel Failing to Give Way. United States v. SS SOYA ATLANTIC (D. Md., January 17, 1963). The USS DARBY and the SS SOYA ATLANTIC came into collision on March 19, 1960, in the mouth of the Chesapeake Bay. Two seamen aboard the DARBY were killed as a result of the collision and the United States' vessel sustained damages in the amount of $350,000. The DARBY was returning to Norfolk proceeding due west while the SOYA was leaving Chesapeake Bay en route to Venezuela. The SOYA claimed that the United States was at fault in failing to give way as the burdened vessel in a crossing situation. The United States claimed the SOYA to be at fault in failing to hold her course, failing to have a lookout, in the alteration of her logs, having an unqualified master and failing to properly maneuver after collision became imminent. The District Court found that the DARBY was solely at fault in failing to alter her course, proceeding at an excessive speed, and having an improper lookout.

Staff: Alan Raywid and Charles Ferris (Civil Division)

No Warranty of Seaworthiness Where Ship Withdrawn From Navigation; Shoreworker Engaged in Major Ship Repair and Overhaul Not Entitled to Warranty of Seaworthiness. Kenneth McQuaid v. United States (S.D. N.Y., March 4, 1963). Libelant, a repair worker employed by an independent shipyard contractor, was injured while using a chipping hammer aboard the USS NANTAHALA, which was undergoing major repair and overhaul under the control and direction of libelant's employer. The injury occurred when a board from a scaffold fell, striking libelant on the head. The action alleged the usual grounds of unseaworthiness and negligence. The Court dismissed the action, holding that the vessel had been withdrawn from navigation and thus there was no warranty of seaworthiness. The Court further held that libelant, engaged in major ship repair and overhaul, was not performing work traditionally done by seamen and, accordingly, if there were any warranty of seaworthiness, it would not extend to him. Finally, the Court held that there was no evidence to sustain a finding of negligence.

Staff: Alan Raywid (Civil Division)

## FEDERAL TORT CLAIMS ACT

Lease Absolves Government From Liability For Fire. Foster v. United States (S.D. Miss., February 21, 1963). Plaintiff sued the Government for negligence which resulted in the destruction of her property by a fire of unknown origin which occurred at the Waterways Experiment Station of the Government near Vicksburg, Mississippi. On July 28, 1958, plaintiff entered into a five year lease of space at the station where she operated a cafeteria until the facility burned about 3:00 a.m., October 3, 1960. The lease expressly convenanted against any duty of the lessor to maintain the leased premises or to make any repairs thereto, and against damages sustained by lessee's property, but provided that lessee should exercise due diligence in the protection of the demised premises against damage or destruction by fire or other causes. Judge Harold Cox, in entering a judgment for the Government stated:

> In the absence of an express covenant in a lease therefor, a landlord is under no obligation to make repairs to the leased premises. He does not impliedly warrant the suitableness or fitness or safety of the leased premises. The lessor is under no duty to detect latent defects in the leased premises and advise the lessee thereof, because he is not an insurer against either of these things.

Staff: United States Attorney Robert E. Hauberg; Assistant United States Attorney E. R. Holmes, Jr., (S.D. Miss.) and Vincent H. Cohen (Civil Division)

National Guardsman Not Called Into Active Federal Service Not Employee of United States; Guardsman Not Agent of Army Officer With Whom He Was Traveling. Gilkey, etc. v. United States (W.D. Ark., January 30, 1963). Plaintiff, accompanied by his wife and infant daughter, was driving his automobile on a snow and ice covered highway when he collided head-on with a Government owned vehicle. The accident occurred on February 7, 1961, near New Blaine, Arkansas. As a result of the accident plaintiff received serious and permanent personal injuries and his wife was killed instantly. Plaintiff sought damages in the total sum of $404,200 from the United States. The Government's principal defense was that the Court was without jurisdiction to adjudicate the action as the driver of the Government car at the time of the accident was a member of the Arkansas Army National Guard and a non-federal employee, and that accordingly the United States was not liable for his negligence under the Tort Claims Act. Spangler v. United States, 185 F. Supp. 531.

The Government vehicle driven by a Col. McDaniel was owned by the United States Army and loaned to the Arkansas National Guard. Col. McDaniel was accompanied by a Col. O'Donnell, an officer in the United States Army and Senior Advisor to the Arkansas National Guard. Col. McDaniel, acting under orders issued by the Arkansas National Guard, and Col. O'Donnell, acting under orders issued by the United States Army, were en route from Camp Robinson, Arkansas, to Fort Sill, Oklahoma, to attend a pre-camp

conference of United States Army officers who were to conduct a National Guard summer camp. The vehicle had been dispatched to Col. O'Donnell as first operator by the Arkansas National Guard Motor Pool earlier on the day of the accident. Col. O'Donnell drove the car and picked up Col. McDaniel at his house on the post. Their respective orders specified only that they were to travel in a Government owned vehicle, but it was customary for these officers, whose duties were correlative, to travel together when they had a common destination. On reaching Morrilton, Arkansas, they stopped at an Army Reserve Center to radio ahead to Fort Sill to check on weather conditions. When they resumed their trip Col. McDaniel drove the car and was still driving when the accident took place.

Judgment on jurisdictional grounds was entered in favor of the United States. The Court held that at the time of the collision Col. McDaniel was not in active Federal service; that he was not an employee of the United States, but rather was an Arkansas National Guard officer acting under orders of the Adjutant General of the Arkansas National Guard; that while driving the automobile neither officer was subject to the direction and orders of the other; and that they were merely traveling companions and acting in accordance with orders received from their respective superiors. The Court rejected plaintiff's additional contentions that under the laws of Arkansas, and under the facts, the Government was liable for any negligence on the part of McDaniel, for the reasons that: (1) "McDaniel, in driving the car, was the agent of O'Donnell and the United States -- custodian and owner of the car respectively; (2) the negligence of McDaniel is imputable to the United States under the doctrine of the employers' liability for the negligent acts of an assistant or helper of the employee; and (3) the negligence of McDaniel was imputable to O'Donnell and the United States under the doctrine of joint venture."

Staff: United States Attorney Charles M. Conway; Assistant United States Attorney Robert E. Johnson (W.D. Ark.) and James B. Spell (Civil Division)

## LIEN PRIORITY

Priority of Judgment Lien Held by United States Governed by Federal Law: Subsequently Accruing Local Tax Liens Held Inferior to Federal Lien. Jamaica Savings Bank v. Nathaniel E. Morgan (E.D. N.Y., December 20, 1962). This suit was brought to foreclose a mortgage on real property encumbered by liens arising in the following sequence: 1. mortgage; 2. judgment lien assigned to Federal Housing Administration; 3. local taxes and water assessments given priority over the prior real mortgage by local statute. The Court held that federal law rather than state law applied to the lien held by the United States because the lien was acquired in the course of a legitimate federal activity, i.e., mortgage insurance under the National Housing Act. This case represents the first instance in which a judgment lien held by the United States has been characterized as a federal lien and thus governed by federal law.

The Government's lien was held to supersede subsequently arising local tax liens on two theories: (1) local taxing authorities cannot reach United States security interests in property (the assignment was made before the local liens arose); (2) the New Britain rule (347 U.S. 81) of first-in-time, first-in-right is applicable not only to tax and mortgage liens, but also to a judgment lien held by the United States.

The same result was reached in the New York State Supreme Court in Jamaica Savings Bank v. Pirozzi, reported February 15, 1963, page 17, New York Law Journal, which applied the Supreme Court's recent holding in United States v. Buffalo Savings Bank, 31 U.S.L. Week 4053 (January 7, 1963), see 11 United States Attorneys Bulletin 48, to a judgment lien situation.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Thomas J. Lilly (E.D. N.Y.)

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# CIVIL RIGHTS DIVISION

## Assistant Attorney General Burke Marshall

Involuntary Servitude and Peonage. United States v. David Icchok Shackney (D. Conn.). On July 17, 1962, a federal grand jury returned a nine count indictment charging defendant with two counts under the peonage statute, 18 U.S.C. 1581(a), and seven counts under the involuntary servitude statute, 18 U.S.C. 1584. The peonage counts charged that beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, defendant held a Mexican man, Luis Oros, and his wife to a condition of peonage. The involuntary servitude counts charged that during the same period defendant wilfully and knowingly held Oros, his wife, and five children to involuntary servitude.

Beginning on January 30, 1963, defendant was tried in the United States District Court at New Haven, Connecticut. The six-week trial featured seven days of testimony by the chief complaining witness, Luis Oros, more than half of which was given under cross-examination.

The Government's evidence, in essence, showed that the Oros family was contracted by the defendant, in Mexico, to come to this country and work on defendant's chicken farm in Middlefield, Connecticut. The so-called contract provided that the father, mother and eldest daughter, who was then 16 years of age, were to care for some 20,000 laying chickens along with another couple; that they were to be paid $160 per month for the three, with board and lodging provided by defendant; and that they were to work seven days a week, 365 days a year, "without exception." The "contract" was for a period of two years, beginning in July, 1961. Upon their arrival at the farm, however, no other couple was ever provided and, instead, the four younger children, ages 14, 12, 9, and 7, were required by defendant to work long hours daily, seven days a week. Instead of the $160 "contract" wages, $200 was paid for the services of the entire family. However, no portion of this amount was ever given to the family and the total amount was credited monthly, by defendant, to an alleged indebtedness of $1,800 which, according to defendant, had been incurred by him in securing the Oroses' visas and transportation to this country. The Government's evidence showed that no more than $600 was spent for these purposes.

The Government's evidence showed that the "holding" was accomplished by defendant through fear which he created by constant threats and other psychological means, threatening to have the family deported, refusing to allow them any contact with outsiders, including attendance at church or school.

At the close of the Government's case, the Court granted defendant's motion for judgment of acquittal with respect to the peonage and involuntary servitude counts which concerned Mrs. Oros, since she had not been a witness and the Court felt that there was no evidence that her sojourn

on the farm was against her will. After a little more than seven hours of deliberations, the jury returned verdicts of "Guilty as charged" on all six remaining counts of involuntary servitude.

Staff: Assistant United States Attorney James D. O'Connor (D. Conn.); Gerald W. Jones (Civil Rights Division)

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# CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

## NOTICE TO ALL UNITED STATES ATTORNEYS

Supervisory Jurisdiction Over Safety Appliance Act and Other Railroad Safety Statutes. Supervisory jurisdiction over the handling of cases under the Railroad Safety Appliance Acts (45 U.S.C. 1-16) and the related railroad safety statutes administered by the Bureau of Safety and Service of the Interstate Commerce Commission (the Hours of Service Act, and Signal Inspection Act, the Locomotive Inspection Act, and the Accident Reports Act) is in the Criminal Division and not the Civil Division. Instructions concerning the handling of cases under the foregoing statutes are set out at pp. 95-96.1 of Title 2, United States Attorneys Manual. It is recognized that these statutes (with the exception of the Accident Reports Act, the enforcement of which is limited to prosecutions in the District of Columbia) are civil and not criminal. Nevertheless, they are within the supervisory jurisdiction of the Criminal Division as made clear by the Manual and by Departmental Order 271-62, as amended (see Section 0.55 in Subpart K - Criminal Division, of Order No. 271-62, 27 F.R. 5167, June 1, 1962, now in 28 C.F.R.). The United States Attorneys are therefore requested to address all correspondence regarding these matters to the Criminal Division.

## THEFT FROM INTERSTATE SHIPMENT

Conspiracy to Violate 18 U.S.C. 659; Pre-trial Motion to Dismiss Conspiracy Count as Duplicitious Denied. United States v. Fay, et al. (N.D. N.Y., February 8, 1963). Count one of the indictment charged that all eight defendants conspired to violate 18 U.S.C. 659. Two of the defendants, who were charged under separate substantive counts of receiving stolen property in violation of 18 U.S.C. 659, attacked the conspiracy count for duplicity. Defendants' theory was that since 18 U.S.C. 659 may be violated by separate and distinct acts (embezzlement, larceny, unlawful taking, carrying away, etc.) separate conspiracy counts should be charged as to each method of removal. Defendants cited United States v. Hopkins, 290 Fed. 619, in support of their contention.

The Court, by memorandum decision, considered the Hopkins case inapposite since that decision involved a substantive charge. The Court held that defendants' argument was improperly directed toward the description of the object of the conspiracy rather than to the conspiracy itself. The Court cited Wong Tai v. United States, 273 U.S. 77, for the proposition that the object of the conspiracy need not be set forth with the detail required in a substantive charge.

Defendants further contended that since they were charged merely with receiving stolen property, they could not be charged with conspiracy to steal such property. In its holding that this issue was

not controlling in testing the sufficiency of an indictment, the Court stated: "This . . . problem is one for the prosecutor and the trial court and involves the substantive law of conspiracy and possibly the extent of the liability of one who enters the conspiracy after the plan has been conceived but its ultimate purpose yet remains to be accomplished."

Staff: United States Attorney Justin J. Mahoney; Assistant United States Attorney Danta M. Scaccia (N.D. N.Y.).

## MAIL FRAUD

Unauthorized Use of Credit Card. Adams v. United States, 312 F. 2d 137 (C.A. 5, 1963). Appellant was convicted under a three-count indictment charging violations of the mail fraud statute (18 U.S.C. 1341), arising out of his use of a credit card issued to one Magie, over a period of several months in a number of states and in some two hundred transactions totalling approximately $3,000.

On appeal, appellant contended that the indictment failed to allege, and the evidence failed to establish, that the use of the mails was in execution of the fraudulent scheme. Kann v. United States, 323 U.S. 88, and Parr v. United States, 363 U.S. 370, were relied upon. The Court of Appeals cited the recent decision in United States v. Sampson, 371 U.S. 75, wherein the Supreme Court stated that Kann and Parr cannot be taken as establishing the proposition that, once a defendant has obtained that which he set out to obtain by fraudulent means, no subsequent mailing can form the basis of a mail fraud prosecution. The Court also distinguished those cases on the factual situations.

The Fifth Circuit held that all of the various sales were part of one unitary scheme and the mailings occurred before the scheme, as a whole, was consummated. The Court also held that the practice of extending credit was inseparably connected with the use of the mails to forward the sales slips to the oil company, and the scheme contemplated the use of the commercial practice which embraced the use of the mails. The Court noted that the use of the mails constituted a part of the scheme since it afforded a delay in the detection of the scheme. (See Kann v. United States, supra, at pp. 94-95.)

The Fifth Circuit further held that the indictment charged, and the evidence established, that the scheme was to defraud not only the distributors but the oil company and the owner of the card, and rejected appellant's contention that since he signed his own name to the invoices there were no fraudulent misrepresentations.

Staff: United States Attorney Woodrow Seals; Assistant United States Attorneys William M. Schultz and James R. Gough (S.D. Texas).

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# IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

## DEPORTATION

Determination as to Place of Deportation Not Reviewable Under Section 106(a) of Immigration and Nationality Act, as Amended, 8 U.S.C. 1105(a). Lam Man Chi, Lum Hong and Young Sau Yu v. Bouchard; (C. A. 3, February 26, 1963.) This case involved an appeal from an order of the United States District Court for the District of New Jersey denying a motion for a preliminary injunction against appellants' deportation to Hong Kong. The complaint alleged that appellants' proposed deportation to Hong Kong was illegal because the Immigration and Naturalization Service had not met the requirements of Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a), by first inquiring as to whether appellants would be acceptable as deportees by Communist China, the (alleged) country of their nationality.

In passing on the appeal, the Third Circuit found it necessary to determine first whether the action should have been brought under Section 106(a) of the Immigration and Nationality Act, as amended, which makes all final orders of deportation reviewable in courts of appeals. The Court noted that appellants were not attacking the finding of deportability but the designation of place of deportation, and after an exhaustive analysis of the cases interpreting Section 106(a) decided that such designation was not a final order of deportation within the meaning of its provisions.

Thus, the Third Circuit has entered into the conflict of circuits on the application of Section 106(a) discussed in the U.S. Attorneys Bulletin of November 30, 1962, page 673. The Second, Third and Ninth Circuits limit Section 106(a) to the review of determination of deportability. Only the Seventh Circuit would expand its review to matters ancillary to the order of deportation, such as administrative denials of applications for relief from deportation. This conflict should be resolved by the Supreme Court in Foti v. INS, 308 F. 2d 779, certiorari granted January 7, 1963, 371 U.S. 947.

After resolving the Section 106(a) issue, the Third Circuit remanded the case to the lower court with directions to make adequate findings of fact and conclusions of law as required by Rule 52(a).

Staff: United States Attorney David Satz, Jr. and
Assistant United States Attorney Sidney E. Zion

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# INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950; Registration of Communist Party Members. Attorney General v. Claude Mack Lightfoot. On January 23-24, 1963, a hearing was conducted before the Subversive Activities Control Board, in Chicago, Illinois, to show the respondent's membership in the Communist Party.

On March 5, 1963, the Subversive Activities Control Board issued an order directing Lightfoot to register as a member of the Communist Party (See United States Attorneys' Bulletin, Vol. 10, No. 25, December 14, 1962).

Staff: James A. Cronin, Jr., Thomas C. Nugent, and Carl H. Miller (Internal Security Division).

Subversive Activities Control Act of 1950; Registration of Communist Party Members. Attorney General v. Samuel Krass Davis. On January 29, 1963, a hearing was conducted before the Subversive Activities Control Board to show the respondent's membership in the Communist Party.

On March 8, 1963, the Subversive Activities Control Board issued an order directing Davis to register as a member of the Communist Party (See United States Attorneys' Bulletin, Vol. 10, No. 25, December 14, 1962).

Staff: James A. Cronin, Jr., Thomas C. Nugent, and Carl H. Miller (Internal Security Division).

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# LANDS DIVISION

Assistant Attorney General Ramsey Clark

## REPORT ON A SMALL TRACTS PROGRAM IN CINCINNATI

A recent issue of the United States Attorneys' Bulletin carried a description of the "crash program" in the Southern District of Ohio instituted to get their condemnation records up to date as a necessary first step to putting on a small tracts program. 11 U.S. Attys. Bull. No. 4, p. 105. On February 25, United States Attorney Joseph P. Kinneary and his staff disposed of 154 condemnation tracts in less than two hours. This was slightly more tracts than had been closed by this District in the preceding eight months. 103 tracts were disposed of without contest on the Government's testimony, and the remaining tracts were quickly settled. A similar small tract program in Cincinnati is planned for March 25, perhaps with an even greater number of tracts being processed than previously.

Assistant United States Attorney Arnold Morelli was primarily responsible for the organization of the small tract program at Cincinnati, in which he was ably assisted by Assistant United States Attorneys Bradley Hummel and Charles Heyd.

Public Lands; Administrative Law; Finality of Administrative Determination. Gabbs Exploration Company v. Udall (C.A. D.C., Feb. 14, 1963). Following passage of the Mineral Leasing Act of 1920, oil shale lands were no longer open to location under the mineral law of the United States. However, the Act contained a savings clause with respect to valid locations made before that date. In the 1920's, the Department of the Interior instituted a number of adverse proceedings seeking to have pre-1920 oil shale claims declared invalid for failure to do annual assessment work. It was held eventually that locators were not obliged to perform annual assessment work and that the claims could not be eliminated on this ground. Wilbur v. Krushnic, 280 U.S. 306 (1930); Ickes v. Development Corp., 295 U.S. 639 (1935).

This suit involved 26 oil placer claims in Rio Blanco County, Colorado, located in 1917 and 1918. In 1929 and 1930, these claims were made the subject of two adverse proceedings wherein, in addition to a charge of failure to do assessment work, it was charged that the claims had been abandoned. The then owners of the claims, although served, failed to answer and by orders entered in 1929 and 1931 the claims were declared null and void by the Commissioner of the General Land Office. More than 25 years later, with a revival of interest in oil shale as a source of petroleum, the Gabbs Exploration Company sought out the original locators and their heirs and obtained quitclaim deeds covering the original claims. The purchaser then applied for a patent. The Manager of the Denver Land Office denied the patent application on the ground that all of the claims had previously been declared null and void. This decision was affirmed by the Director, Bureau of Land Management, and by the Secretary of the Interior.

In this suit, which then followed, the district court entered summary judgment in favor of the defendant, the Secretary of the Interior, and denied plaintiff's motion for the same relief.

Appellant contended (a) that the original decisions in 1929 and 1931 were actually based on the erroneous ground that there had been failure to do assessment work and that the charge of abandonment was merely a rephrasing of the charge relating to failure to do assessment work; (b) that the charge of abandonment had not been spelled out in the adverse proceedings in the manner required by the then applicable Department of the Interior procedural rules; and (c) that the Secretary of the Interior had no authority to declare a claim null and void on the ground that it had been abandoned. Appellant relied primarily on the latter charge, arguing that a valid mining claim constitutes a property right which cannot be divested in an administrative proceeding. Appellant conceded that the Secretary of the Interior has a right to determine whether a discovery has been made, Cameron v. United States, 252 U.S. 450, but argued that a charge of abandonment presumes the existence of a discovery and therefore involves a divestiture as opposed to a determination of initial validity. Appellant also contended that a statement in Ickes v. Development Corp., 295 U.S. 639 (1935), that the Secretary could determine that a claim "was subject to cancellation by reason of abandonment" was an erroneous dictum having nothing to do with the issues under consideration in the Ickes case.

The Court of Appeals held that the charge of failure to do assessment work and the charge of abandonment were separate and distinct charges and that the Secretary had authority to declare claims invalid for abandonment even though the charge of failure to do assessment work would have been subject to challenge. It concluded that the authority of the Secretary to cancel the claims by reason of abandonment had been authoritatively settled in the Ickes case and that even if the statement in the Ickes case were to be considered a dictum it, nevertheless, correctly stated the law and should be followed.

Staff: Thos. L. McKevitt and Harold S. Harrison (Lands Division).

Transfer of Actions; Suits Against Government Officers. Little v. Seaborg (D.C. D.C.). This action was filed to require the Atomic Energy Commission to make payments to plaintiff, pursuant to the provisions of 43 U.S.C. 315q, resulting from the termination of grazing licenses covering public lands in Idaho. Suit was instituted in the District of Columbia because, at the time it was filed, members of the Atomic Energy Commission were subject to suit only in the District. Following passage of the Act of October 5, 1962, 76 Stat. 744, granting all United States district courts mandamus jurisdiction and venue of proceedings against Government officers, plaintiff moved for transfer to the United States District Court for the District of Idaho. This motion was opposed on the ground that 28 U.S.C. 1404(a) permits transfer only to a district where the action could have been brought at the time it was filed. It was argued that although the

United States District Court for the District of Idaho would now have original jurisdiction of a suit of this type it could not have obtained jurisdiction, at the time suit was instituted, without consent of the defendants. This position was based on an interpretation of the transfer statute by the Supreme Court in Hoffman v. Blaski, 363 U.S. 335. Cf. Continental Grain Co. v. Barge FBL-585, 364 U.S. 19. On January 25, 1963, Judge Walsh denied the motion to transfer.

Staff: Thos. L. McKevitt (Lands Division).

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# TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

## CRIMINAL TAX MATTERS
### Appellate Decision

Wilfully Assisting and Advising in Preparation of False Tax Returns, Section 7206(2), I.R.C. of 1954; Denial of Request for Names of Grand Jury Witnesses and Their Testimony, Rule 6(e), F.R.Cr.P. United States v. J. Lacey Barnes (C.A. 6, February 6, 1963). The Sixth Circuit, in affirming this conviction, found inter alia that there was sufficient evidence to sustain the charges against defendant, an attorney in Knoxville, Tennessee, of thirteen counts of wilfully assisting, etc. in the preparation of false income tax returns of others, for which defendant had been assessed a three-year concurrent sentence. Taxpayers would submit correct tax information to defendant, signing their tax forms in blank and giving defendant powers of attorney. Sometimes defendant would loan money to taxpayers, taking as security taxpayers' transfers to him of their interests in refund claims; sometimes defendant would purchase outright taxpayers' interests in such refunds. Each of the returns submitted by defendant to the Internal Revenue Service reflected a claim for one more exemption, the name being fabricated, than the number to which the taxpayer was entitled. Refund checks were mailed to defendant's Post Office boxes. Defendant pocketed the difference between the amounts he had paid to or credited to taxpayers and the amounts actually refunded.

On a motion to dismiss the indictment, defendant had sought production of the names of the grand jury witnesses and transcripts of their testimony, Rule 6(e), F.R.Cr.P., which was summarily denied by the district court. The Court of Appeals held that the district court's action was proper, based as it was on defendant's naked conclusion that there was no competent evidence before the grand jury, and that this was consonant with the Supreme Court's refusal in Costello v. United States, 350 U.S. 359, to establish a rule making grand jury minutes easily accessible.

Staff: United States Attorney John H. Reddy (E.D. Tenn.)

## CIVIL TAX MATTERS
### Appellate Decision

Suit to Restrain Collection of 100% Penalty Assessed Against Responsible Parties for Failure to Remit Withholding Taxes Owed by Corporation With Which They Were Affiliated Is Subject to Same Considerations That Prohibit Suits to Restrain Collection of "Tax". Botta, et al. v. Scanlon (C.A. 2d, February 18, 1963). Plaintiffs sought to restrain the collection of penalty assessments made against them pursuant to Section 6672 of the 1954 Code, on the grounds that they were not the persons responsible for the corporation's failure to

remit the withholding taxes owed, and that collection of the assessment would cause "irreparable injury." The complaint alleged that none of the plaintiffs had the duty to collect the tax, prepare the returns and pay the tax, and that they never signed and filed any of the returns. The complaint further alleged that two of the plaintiffs (Botta and Santaniello), were officers of the corporation but that the other one (Montagni), although owning 20% of the stock, was neither an officer nor an employee and had nothing to do with the financial affairs of the corporation.

In affirming the district court's dismissal of the complaint, the Court of Appeals rejected appellants' argument that the assessments were in the nature of a penalty and did not come within the prohibition of Section 7421(a) against suits to restrain the collection of a "tax." In doing so, the Court noted that Section 6672 penalty is "simply a means of ensuring that the tax is paid" in a case like the present, where the amount of the tax was withheld from the employees but not paid over to the Government by the corporation. The Court then held that the appellants did not show that the Government acted in bad faith and that it could not establish its claim under a favorable view of the law (citing Enochs v. Williams Packing, 370 U.S. 1 (1962)).

Staff: Lee A. Jackson, Joseph Kovner, Ralph A. Muoio (Tax Division)

## District Court Decisions

Priority of Liens; Government's Tax Lien Entitled to Priority Over Various Claimants to Proceeds From Fire Insurance Policies on Taxpayer's Property. Home Insurance Co., et al. v. B. B. Rider, et al. (D.C. N.J., 1963), 63-1 USTC ¶9235. The United States intervened to assert its liens upon the fund in court which represented the proceeds of fire insurance policies on the taxpayer's cabaret and fixtures destroyed by fire. The liens arose prior to the date of the fire. The various other claimants to the fund included a chattel mortgagee who had, prior to the occurrence of the fire, allegedly caused taxpayer to procure an endorsement to the policy naming the chattel mortgagee as beneficiary to the extent of its loss. The Court denied the mortgagee's claim that the proceeds, to the extent of that loss, were not the property of taxpayer and hence were not subject to the Government's liens for taxes. The Court indicated that the language of the insurance policy and the endorsement thereto would define the mortgagee's rights. The failure of the mortgagee to produce the policies or the endorsements, or secondary evidence thereof, deprived it of any priority it might have been entitled to.

Other claimants to the fund were conditional vendors who claimed priority based on conditional sales contracts which had been entered into prior to the creation of the Government's liens for taxes. The Court held that the contracts which required the vendee to procure insurance for the subject chattels created, at most, an equitable lien to the extent of the

insurance proceeds representing those destroyed chattels. These liens were inchoate and subordinate to the perfected federal liens for taxes. Further, the proceeds are not deemed to be in substitution of the property destroyed.

Other claimants to the fund were judgment creditors whose liens were subordinate to the federal liens for taxes which had been filed prior thereto. A notice of levy having been served on the insurance company by the Government prior to the filing of a petition in bankruptcy of the taxpayer, avoids the operation of Section 67(c) of the Bankruptcy Act by preventing the policies' proceeds, the interpleaded sum, from coming under the jurisdiction of the bankruptcy court.

An insurance adjuster's claim based on a written agreement of taxpayer to pay ten percent of the recovery for the services of the adjuster was denied. The Court denied the argument that the adjuster created the fund in court, and held that the agreement created no lien but merely created a contract right. Further, the agreement postdated the date of the fire and therefore the taxpayer-insured had, by then, lost his rights in the policies' proceeds.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney F. Michael Caruso (D. N.J.); and Arnold Miller (Tax Division).

Tax Liens Against Contractor Awarded Priority in Fund Held By Garnishee to Claim of Surety Who Had Not Fully Satisfied Claims of Materialmen Pursuant to Its Bond With Contractor. Spence Brothers v. United Electric Co., et al. (Circuit Court, Genesee County, Michigan, January 18, 1963.) This action is based on two writs of garnishment by a materialman to obtain funds held by the garnishee which were the balance due on a contract entered into by defendant, an electrical contractor for a building, and the garnishee defendant, a municipal corporation and owner of the building. Plaintiff-materialman also has recovered judgment against the surety for these two claims. The United States had assessed withheld income tax liabilities against the electrical contractor; because of its tax liens it was named a party-defendant. Subsequently, the United States was dismissed and intervened as a plaintiff.

The electrical contractor had been financially unable to complete his work under the contract with the city, and the surety had advanced sums of money to the electrical contractor to complete the work pursuant to their agreement. Before all the materialmen had been paid, the surety had gone into receivership. The question before the Court was the priority among several claimants to the fund held by the garnishee.

Plaintiff had recovered two judgments against defendant, the basis for its writs of garnishment against the garnishee. The federal tax liens

were subsequent to the first judgment and prior to the second judgment as well as prior to the judgment of plaintiff against the surety. The surety claimed that the default of the contractor had precluded the United States from making a claim to the fund held by the garnishee. An assignee of defendant also claimed the fund by virtue of the assignment.

The Court stated that as the surety had not completed its obligations under its bond it could not claim the fund; the Court also stated that the assignment by the defendant of proceeds from the fund was not valid because it had not been consented to by the surety as was required in their agreement. Accordingly, the Court awarded first priority to the first judgment of plaintiff against defendant, second priority to the federal tax liens, and third priority to the second judgment of plaintiff; such an award exhausted the fund before the second judgment of plaintiff was fully satisfied.

Staff: United States Attorney Lawrence Gubow; Assistant United States Attorney Robert F. Ritzenhein (E.D. Mich.); and Maurice Adelman, Jr. (Tax Division).

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