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UNITED STATES ATTORNEYS
BULLETIN

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FILING METHOD FOR READY ACCESS TO BULLETIN ITEMS ON FEDERAL RULES OF CRIMINAL PROCEDURE

Occasionally, inquiries on the Rules procedures received from United States Attorneys indicate that some are either unaware of, or have overlooked, disposal of the problem by court decision or under Department policy discussed in previous issues of Part II (now Appendix) of the Bulletin.

This service was inaugurated on February 25, 1946 (Vol. 1, No. 1, Criminal Division Bulletin), about a month before the new Federal Rules of Criminal Procedure became effective on March 21, 1946, for the information and use of the central office and field attorneys' staffs. In 1953, the Criminal Division Bulletin was merged with the United States Attorneys Bulletin, covering all Divisions of the Department of Justice. Since that time, the Rules material has appeared as an Appendix, separately paged.

From time to time, the suggestion has been made to United States Attorneys that the series be detached from the Part I service (dealing with substantive law) and kept chronologically as a permanent file. (Criminal Division Bulletin; Vol. 7, No. 11, June 23, 1952; United States Attorneys Manual, Title 2, p. 1.)

It is hoped that in those offices which may not have adopted the practice a separate book series will be kept for the Rules service in which the issues are filed under the Rule numbers. In that way all staff attorneys will be kept informed as to procedural developments, successive court decisions and any changes in Departmental policy.

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ADMINISTRATIVE DIVISION

Assistant Attorney General S. A. Andretta

ECONOMY

The following excerpts from President Johnson's budget message of January 21 are brought to your attention:

EFFICIENCY AND ECONOMY IN GOVERNMENT

I call upon all Government employees to observe three paramount principles of public service:

First, complete fairness in the administration of governmental powers and services;

Second, scrupulous avoidance of conflicts of interest; and

Third, a passion for efficiency and economy in every aspect of Government operations.

For its part, the Federal Government must be a good employer. It must offer challenging opportunities to its employees. It must be prompt to recognize and reward initiative. It must pay well to attract and keep its share of dedicated and resourceful workers. It must welcome fresh ideas, new approaches, and responsible criticism.

For 33 years I have been in Government service. I have known its challenge, its reward, and its opportunities. But all these will multiply in the years to come. The time is at hand to develop the Federal service into the finest instrument of public good that our will and ingenuity can forge.

Controlling Employment. -- Although both our population and our economy are growing and placing greater demands upon the Government for services of every kind, I believe the time has come to get our work done by improving the efficiency and productivity of our Federal work force, rather than by adding to its numbers.

Salary Reform and Adjustment. -- Although this budget is deliberately restrictive, I have concluded that Government economy will be best served by an upward adjustment in salaries. In the last year and a half the Federal Government has taken far-reaching steps to improve its pay practices. The Federal Salary Reform Act of 1962 and the Uniformed Services Pay Act of 1963 established the principle of keeping military and civilian pay generally in line with pay in the private economy. This is a sound principle, and it is reinforced by the sound procedure of annual review. This principle is fair to the taxpayer, to Government employees, and to the Government as an employer.

WITNESSES--ARMED FORCES AND GOVERNMENT EMPLOYEES

Many requests for Armed Forces and Government-employee witnesses are submitted without enough information to enable the agency involved to identify the person needed.

Please furnish serial number, rank, organization, and branch of service when requesting Armed Forces witnesses. It is very important to give the date and source of this information since the military records in Washington sometimes do not agree with the Form DJ-49, and this Division is unable to ascertain which address is more current. When requesting Government-employee witnesses, please show the complete official address with the date of such information.

There have been several instances where United States Attorneys have forwarded requests for Armed Forces witnesses direct to the witness's agency in Washington without clearing or confirming the action with the Administrative Division. Even though the witness is a member of the agency involved in the litigation, it is necessary that a Form DJ-49 be forwarded when the situation falls within the regulations in the United States Attorneys' Manual, Title 8, page 122.

In criminal cases it is also important to indicate when the military or Government employee is a witness for an indigent defendant, which, of course, requires proof of indigency. When a defendant, other than an indigent, requests assistance in securing military personnel as witnesses, it is suggested that the United States Attorney refer him to the witness's commanding officer, who has regulations governing such requests. The Administrative Division will assist in obtaining addresses of military personnel for the defendant if he requires such assistance.

REDUCING MULTIPLE COPIES

Our unnumbered memo dated July 1, 1963, on the subject of "Travel and other expenditures" urges, among other things, a reduction in duplicating expenses. See page 1, paragraph 5, of the memo. Many Forms 25B are received with four or five copies of a memo, court order, etc.,--one copy attached to each copy of the Form 25B. Apparently, some confusion arises in interpreting the instructions in Memo 355 (Psychiatric Examinations and Testimony)--page 1, paragraph 4. It is intended that one copy of the court order be attached to each request, or set of Form 25B.

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 3, Vol. 12 dated February 7, 1964:

MEMO	DATED	DISTRIBUTION	SUBJECT
256-S2	1-31-64	U.S. Attorneys	Correspondence with other Gov. agencies Re status of cases - General Accounting Office

MEMO	DATED	DISTRIBUTION	SUBJECT
365-S1	2-4-64	U.S. Attorneys & Marshals	Travel Regulations

ORDER	DATED	DISTRIBUTION	SUBJECT
310-64	1-28-64	U.S. Attorneys & Marshals	Designating officials to perform functions & duties of certain offices in case of absence or inability or disqualification to act-Title 28--Judicial Admin., Chapter I, Part 0. Amends 0 271-62.
311-64	2-3-64	U.S. Attorneys	Authorizing Carl W. Belcher to perform functions and duties of U.S. Atty. for Southern District of West Virginia During Vacancy in that office.
312-64	2-3-64	U.S. Attorneys	Authorizing John H. Kamlowsky to perform functions & duties of U.S. Atty. for Northern District of West Virginia During Vacancy in that office.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

DISTRICT COURT CASES

FILED

Indictment and Complaint Charging Violation of Section 1 of Sherman Act. United States v. New Orleans Chapter, Associated General Contractors of America, Inc., et al. (E.D. La.) D.J. File No. Cr.-60-12-112; Civ.-60-12-116. On January 28, 1964, a grand jury in New Orleans, Louisiana indicted the New Orleans Chapter, Associated General Contractors of America, Inc. and six members of the Association's Rules and Arbitration Committee for violation of Section 1 of the Sherman Act.

Defendants and their co-conspirators were charged with developing and enforcing a rule requiring members to boycott and refuse to bid on building projects when the owner or architect, rather than the general contractor, took bids from subcontractors. The indictment further alleged a conspiracy to induce acceptance of this rule among owners, architects and other involved in building construction, and charged that the Committee, of which the six individual defendants were members, was responsible for the administration and policing of the rule.

On the same day, a civil complaint directed against the Association, was also filed. In addition to the violation charged in the indictment, the complaint also alleged that the Association and its membership agreed that each member would include in his bids the cost of quantity surveys and Chapter dues to be paid by the successful bidder. A quantity survey is a listing of the amounts of materials needed for completion of a construction project.

The complaint seeks, among other things, to prevent the Association from unlawfully dictating the manner in which bids shall be taken for construction work and asks that it be precluded from obtaining quantity surveys for bidders and requiring the inclusion of these and other costs in bids submitted by general contractors.

Staff: Charles L. Beckler and Barton Veret (Antitrust Division)

Manufacturers Of Sportswear Indicted Under Sherman Act. United States v. Jantzen Inc., et al. (D. Ore.) D.J. File No. 60-148-76. On February 6, 1964, a grand jury in Portland, Oregon, returned an indictment against four manufacturers of ladies' swimwear. Defendants are Jantzen, Inc. of Portland, Oregon; Catalina, Inc. of Los Angeles, California; Cole of California, Inc. of Vernon, California, and Rose Marie Reid of Los Angeles, California.

The indictment alleged that defendants and unnamed co-conspirators engaged in a nation-wide conspiracy in violation of Section 1 of the Sherman Act to fix, stabilize and maintain prices of women's branded swimwear by agreeing upon and enforcing uniform dates prior to which retailers were not allowed to reduce prices.

Arraignment is scheduled for February 26, 1964, at Portland, Oregon.

Staff: Charles Donelan and John W. Poole, Jr. (Antitrust Division)

Complaint Under Section 1 of Sherman Act Against Fertilizer Industry. United States v. International Ore & Fertilizer Corporation, et al., (M.D. Fla.) D.J. File No. 60-138-147. On February 11, 1964, a complaint was filed charging seven phosphate rock producers, three oil companies and one exporter with selling phosphate rock through a common exporter so as to allocate tonnages and fix non-competitive prices in export sales of phosphate rock. This policy has resulted in the elimination of all competing exporters from selling phosphate rock abroad. Phosphate rock is a basic fertilizer material which for all practical purposes can be exported only from Florida where it is mined, because other available sources in the United States are so far from the coast that the freight involved makes such sales prohibitive. Total sales of phosphate rock through this exporter exceeded $10 million in 1961.

The complaint seeks to enjoin the producer-defendants from selling through a common broker and to prohibit the exporter from selling the product of more than one producer. The Court was further requested to enjoin each defendant from participating in any Webb Pomerene association for a period of ten years.

The three oil companies were made defendants because they had recently purchased phosphate rock producers who had entered into the conspiracy prior to their acquisition.

Staff: Charles R. Esherick, E. Leo Backus, Albert P. Lindemann, Jr., L. David Cole and Lawrence M. Jolliffe (Antitrust Division)

PENDING

Court Denies Motions to Dismiss, Judgment of Acquittal And For New Trial. United States v. Tubesales, et al. (D. Ore.) D.J. File No. 60-138-140. On January 28, 1964, Judge Solomon denied the defendant ESCO Corporation's motions in arrest of judgment and to dismiss the indictment for lack of jurisdiction. The Court at the same time denied ESCO's motions for judgment of acquittal and for a new trial. In a brief written opinion the Court found that overt acts in furtherance of the conspiracy by ESCO and by the other defendant-conspirators, committed within the District of Oregon, supported the jurisdiction of the Court, citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

The Court also rejected defendant's claims of error in the admission or rejection of certain pieces of evidence, and in particular its broader claim that where only one defendant is on trial on a conspiracy charge, acts and declarations of co-conspirators are admissible only if they relate to conversations and acts participated in by the defendant on trial himself. The Court held there was ample evidence introduced to support the jury's verdict, and that defendant was not prejudiced by the court granting permission to Government counsel to ask leading questions of witnesses from the industry who were employees of the other defendants or co-conspirators and who were friendly to the defendant ESCO Corporation.

Sentencing was set for February 14, 1964.

Staff: Don H. Banks, Marquis L. Smith, and Anthony E. Desmond (Antitrust Division)

Motion to Transfer Denied. United States v. United States Steel Corporation, et al. United States v. Taylor Forge and Pipe Works, et al. (S.D. N.Y.) D.J. File Nos. 60-138-142 and 60-138-143. On February 5, 1964, Judge Frederick Van Pelt Bryan denied defendants' motions, made pursuant to Rule 21(b), F.R. Crim. P., to transfer these cases from New York to Pittsburgh for trial. In denying defendants' motions, which were based principally on alleged inconvenience and hardship to defendants if the cases were tried in New York, Judge Bryan relied upon the fact that (1) many of the alleged illegal activities carried on by defendants took place in New York City, as confirmed by the Court's examination of the grand jury transcript, (2) the Antitrust Division has no field office at Pittsburgh but does have an office in New York, staffed to handle the cases, (3) in a third indictment, number 62 Cr. 393, charging Bethlehem, U.S. Steel and others with price fixing in the open die steel forgings industry, no attempt to transfer the case to Pittsburgh had been made, (4) the two cases before the court and the open die steel forgings case all arose out of a single grand jury investigation and the transfer of some of the cases to Pittsburgh would create Government staff problems, and (5) the Government acted in good faith in seeking the indictments in the Southern District of New York and there was no abuse by the Government in its choice of forum.

Staff: Allen A. Dobey, Louis Perlmutter and S. Robert Mitchell (Antitrust Division)

TERMINATED

Judgment For Government Entered. United States v. The Watchmakers of Switzerland Information Center, Inc., et al. (S.D. N.Y.) D.J. File No. 60-28-15. On January 22, 1964, Judge M. Cashin entered a final judgment terminating this case. On December 20, 1962, after trial, the Court had found that defendants against whom the case was tried had conspired in violation of Section 1 of the Sherman Act and Section 73 of the Wilson Tariff Act. The case was instituted in October, 1954 and had involved 22 defendants, 12 of which, importers of watches and an advertising agency, agreed to consent judgments entered in 1959. Trial against the remaining 10 defendants started in November, 1960 and final arguments were held in December, 1961.

The Court had found that the 4 American watch manufacturers involved had conspired with 5 Swiss defendants to eliminate competition in the United States production, import, export and sale of watches, watch parts and watchmaking machinery. The conspiracy had been effectuated through defendants' industry-wide agreements known as the Collective Conventions which were designed to prevent the development and growth of competitive watch industries outside of Switzerland, particularly in the United States.

The Court held that through the Collective Conventions, defendants had restricted and limited the manufacture of watches and watch parts in the United States, and the United States import and export of watches, watch parts and

watchmaking machinery. The conspiracy was further implemented through agreements among various organizations restricting the import into the United States of Swiss watchmaking machinery and through cartel agreements with the British, French and German watch industries restricting the United States import and export of watch machinery and watch parts. The Court found that the American defendants Bulova, Benrus, Bruen and Longines-Wittnauer actively participated in the conspiracy through their adherence to these agreements and through their execution of individual contracts restricting the volume of watches produced in the United States and limiting the United States Export of domestically produced watches and the re-export of Swiss watches. These agreements were also intended to protect American importers from price competition and to eliminate the sale of non-Swiss watches in the United States. Further, defendants had boycotted and blacklisted companies engaged in the sale of Swiss watches in the United States who did not comply with the "regulations" promulgated by the Swiss defendants.

Among the specific findings made by Judge Cashin were that Benrus had agreed to terminate its production of watches in the United States and to dismantle its Waterbury, Conn., plant so that it could not be utilized by any potential competitor in the production of watches; Bulova agreed to limit its United States watch production to one-third of its Swiss watch imports and Gruen agreed not to manufacture more than 75,000 watches a year in the United States.

The Court's judgment adopts almost in toto the judgment proposed by the Government. The one substantive variance was that the Court narrowly defined watches, limiting them to jewel lever watches, whereas the Government had sought to include those powered by electric and electronic force and pen lever watches. The injunctive provisions of the judgment strike down all of the restrictive agreements and regulations so that there will not be any concerted limitation upon production, imports, exports and sale of watches, watch parts and watchmaking machinery in the United States.

Two of the Swiss defendants, one a trade association and the other a holding company of Swiss watch parts manufacturers, are required, in effect, to assure that United States manufacturers may freely obtain Swiss watch parts and watches if such parts and watches are being sold to anyone outside of Switzerland. Because of the U. S. manufacturing defendants having Swiss-based plants, the judgment contains rather elaborate provisions seeking to prevent the Swiss defendants from discriminating against those plants for their taking action required or prohibited by the judgment.

The judgment will not become effective until all appeals have been finally determined, or until the time for taking an appeal has expired.

Staff: Wm. D. Kilgore, Jr., Alfred Karsted, Max Freeman, John J. Galgay, John Sirignano, Jr. and Howard Breindel (Antitrust Division)

Petroleum Company Disposes of Stock in Clayton Act Case. United States v. Phillips Petroleum Company, et al. (S.D. Calif.) D.J. File No. 60-0-37-473. The complaint in this action, filed on December 9, 1960, charged a violation of Section 7 of the Clayton Act arising out of a continuing series of purchases by

Phillips of the beneficial interest in common stock of defendant Union, which at the time of the filing of the complaint constituted approximately 14.8 percent of the total outstanding stock of Union.

On January 27, 1964, the Court approved a stipulation of the parties and an order dismissing without prejudice the action as to all defendants. The stipulation and order included dismissal of a cross-claim by Union against Phillips and vacated a preliminary injunction entered on January 13, 1963. The preliminary injunction enjoined Phillips, inter alia, from acquiring additional stock in Union, or from acquiring proxies or exercising voting rights, or from attempting to obtain representation on the board of directors of Union. The dismissal followed action taken by Phillips on July 19, 1963, transferring all of its stock in Union, a total of 1,340,517 shares, to Daniel K. Ludwig, an individual, whose principal business interests were in shipping. Phillips' disposition of the stock occurred after the Government had filed a second set of interrogatories and noticed depositions of the six top executives of Phillips in Bartlesville, Oklahoma. The Government was notified of the contemplated sale to Ludwig in conformity with the terms of the preliminary injunction. Scheduled discovery was stayed by stipulation and order under the terms of which any party could restore discovery on two weeks notice. The respective counsel for Phillips and Ludwig submitted details requested by the Government concerning the Ludwig transaction and Ludwig's background and stock and business interests. In the agreement of purchase with Phillips, Ludwig represented that he was purchasing the shares of Union stock solely for his own personal account and that in making such purchase he was not acting as agent or nominee for any other person, firm or corporation. Based on the disclosure made, the Government interposed no objection to the transaction and it was thereupon consummated. The prayer for relief, in addition to seeking the preliminary injunction, sought divestiture of the stock in such amounts and under such terms and conditions as the Court should prescribe as necessary to dissipate the effects of the unlawful acquisition. The disposition by Phillips of all of its shares of Union stock achieved in substance all of the relief prayed for.

Staff: Stanley E. Disney, Lawrence W. Somerville and John D. Gaffey (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

BANKRUPTCY

Under Second Circuit Rule, Secured Creditor of Bankrupt Must Bear Pro-Rata Share of Expense of Sale of Security. In the Matter of Rapid Motor Lines, Inc., Bankrupt (C. A. 2, January 7, 1964). Upon petition of the Trustee in Bankruptcy, and with the consent of Small Business Administration, the lienor, certain assets of the bankrupt were sold free and clear of liens, the liens to attach to the proceeds. The sale yielded a sum far in excess of SBA's secured claim. The Referee charged SBA's share of the proceeds with a pro-rata share of the expense of sale. On review the district court affirmed, holding that it was bound by the Second Circuit's decision in In re Myers, 24 F.2d 349. There the sale yielded a surplus over the lienor's claim, and the lienor, who was required to share the proceeds of the sale with certain general creditors because his mortgage was not filed in accordance with New York law, was charged with a part of the expenses of sale.

The Court of Appeals affirmed in a per curiam decision on the authority of the Myers case. It rejected the Government's argument that Myers could be distinguished but that, in any event, the Court should adopt the more equitable rule followed by the Third, Fifth and Tenth Circuits in In Re Street, 184 F.2d 710, R.F.C. v. Cohen, 179 F.2d 773, and Oppenheimer v. Oldham, 178 F.2d 386, respectively, that where the sale yields a surplus for the general creditors, the lienor's share should not be diminished by any administrative expenses. The Court stated that this was not an occasion for re-appraisal of the principles set forth in the Myers decision.

Staff: Kathryn H. Baldwin (Civil Division)

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Subpoena Power of Secretary of Labor Under Act Extends to Documents of Unincorporated Associations; Statutory Provision Granting Immunity to Witness Producing Documents Does Not Extend to Officer of Association Who Is Directed to Produce Association's Documents. Local 57, International Union of Operating Engineers v. W. Willard Wirtz (C. A. 1, January 10, 1964). The district court had ordered the enforcement of a subpoena under the Labor-Management Reporting and Disclosure Act of 1959, directing the appellant union to produce its books and records relating to all matters required to be reported under the Act. In its appeal, the union asserted that the order was erroneous in several respects. Appellant principally contended that (1) the Secretary's subpoena power under the Act, being the same as the subpoena power of the F.T.C. under section 9 of the F.T.C. Act, extended only to the books and records of corporations being proceeded against; and (2) by directing the subpoena to an unincorporated association, while requiring an officer thereof to produce the union's books and records, the Secretary of Labor was depriving the officer of the benefits of the Act's immunity provision for witnesses producing documents.

The First Circuit, in affirming, rejected both arguments. The Court held

that the subpoena power under the F.T.C. Act was not confined to corporations, saying: "The first paragraph of section 9 of the F.T.C. Act...although perhaps inartfully drafted, is concerned with two separate investigatory powers: that of access and copying, and that of subpoena. While the former power is limited in its application by the terms of the F.T.C. Act to 'corporations being investigated or proceeded against,' the subpoena power is not so restricted." As to the argument based upon the statutory immunity clause, the Court held that such immunity provisions were co-extensive with the privilege against self-incrimination. Since an officer of the union could not invoke the Fifth Amendment privilege with respect to union documents held by him in a representative capacity, he would not be entitled to the benefits of the statutory immunity provision, regardless of whether the subpoena was addressed to the union or the officer. Finally, the Court rejected appellant's arguments that the Secretary had to show probable cause for the issuance of the subpoena and that the subpoena was too broad in scope.

Staff: Morton Hollander and John C. Eldridge
(Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Death Arising Out of Concussion Sustained as Result of Seizure and Fall on Floor on Employer's Premises Not Compensable. June L. Wolff v. Britton (C.A. D.C. January 16, 1964). The record before the deputy commissioner indicated that decedent, who had recently begun work as a mechanic in the shop involved, had an ideopathic seizure, fell to the floor, striking his head. The injury occurred just prior to quitting time while the employees were standing around drinking soda pop near the door of the shop. The deputy commissioner, denied benefits, following a line of cases which held that, when something goes wrong within the human frame causing a fall on the floor, the resultant injury or death is not one arising out of or in the course of employment. The rationale of these cases is that the floor is not generally an additional hazard of occupation.

The deputy commissioner's decision was affirmed by the district court and the Court of Appeals on the ground that it was supported by the record (which indicated that the seizure was caused by internal factors unrelated to the work, and that decedent struck his head on the floor, not on any work equipment) and by legal authority (cases holding that the injury must arise out of the "zone of special danger" created by the conditions or obligations of employment).

Staff: George M. Lilly and Alfred N. Myers
(Department of Labor)

REMEDIES

Where Corporate Property, or Proceeds From Sale Thereof, Are Distributed to Stockholders in Connection With Dissolution or Winding Up of Corporation, Corporate Creditor May Pursue Such Property or Proceeds in Hands of Stockholder Without First Reducing Claim Against Corporation to Judgment; Instant Suit Not Time-barred by Pre-1958 Version of 49 U.S.C. 304a. Stewart v. United States (C. A. 10, January 22, 1964). This action was brought by the Government against

stockholders of a defunct corporation to recover for transportation overcharges received by the corporation. The suit was premised on the "trust fund" theory, pursuant to which corporate stockholders may be held liable for pre-existing corporate debts to the extent of property (or proceeds from the sale thereof) received in connection with the dissolution or winding up of the corporation. The district court upheld the Government's claim and awarded judgment thereon.

The judgment was sustained on appeal. The Tenth Circuit held (1) that the situation presented was appropriate for employment of the "trust fund" remedy, since the debtor corporation was defunct, and had sold its assets and had distributed the proceeds to its sole stockholder without satisfying the pre-existing debt owing to the Government, and (2) that a debtor need not, as a condition precedent to maintaining such an action, first obtain a judgment against the corporation where it is plain, at the time that such a judgment would be worthless. Finally, the Court of Appeals upheld the Government's position that the time limitation in the pre-1958 version of 49 U.S.C. 304a did not govern this action in view of (a) the lack of an express reference to Government actions, and (b) the later amendment of this section making it expressly applicable to such actions.

Staff: Stephen B. Swartz (Civil Division)

TORT CLAIMS ACT

Findings That Weather Bureau Forecasts Were Not Negligently Worded or Prepared Upheld. Whitney Bartie v. United States (C.A. 5, January 21, 1964). This was a test case to determine whether the United States was legally responsible under the Tort Claims Act, because of the actions of the Weather Bureau, for the hundreds of deaths occurring when Hurricane Audrey struck Cameron Parish, Louisiana, in 1957. Plaintiff had contended that the Weather Bureau's forecasts negligently caused the deaths, because they allegedly failed to warn of the high winds and water preceding the hurricane's eye, failed to tell the people to evacuate, failed to inform the public of the precise margin of error involved in a hurricane forecast, and mis-predicted the arrival time of the storm because of faulty information-gathering procedures. After a trial of the case, the district court rendered judgment for the Government on four independent grounds: 1. there was no negligence; 2. the forecasts of the Weather Bureau were not the proximate cause of the deaths; 3. the action was barred by the discretionary function exclusion to the Tort Claims Act, 28 U.S.C. 2680(a); and 4. the action was barred by the Act's misrepresentation exclusion, 28 U.S.C. 2689(h). The Court of Appeals affirmed, holding that the findings of no negligence and no proximate cause were not clearly erroneous and were "fully justified by the evidence." The Court accordingly did not pass upon the applicability of the discretionary function and misrepresentation exclusions in the Act.

Staff: John C. Eldridge (Civil Division)

Government Has No Duty to Insure That Employees of Independent Contractor Have Safe Place to Work Where Government Neither Owns Nor Controls Premises Where Work Is Being Done. Billy E. Dunn v. United States (C. A. 6, January 9, 1964). Plaintiff, an employee of a corporation which had contracted to

manufacture ambulances for the Government, while working on the ambulances, contracted lead poisoning because of the failure of his employer to furnish him with a safe place to work. He attempted to fix liability upon the Government under the principle that a contractee has a non-delegable duty to provide the employees of an independent contractor with a safe place to work, particularly where the work was extra hazardous. Both the district court and the Court of Appeals agreed with our position that this principle was entirely inapplicable where the contractee did not own or control the premises where the work was being done.

Staff: John C. Eldridge (Civil Division)

TRADING WITH THE ENEMY ACT

"Technical" Enemy May Not Maintain Suit Under Section 9(a) to Recover Vested Property. Handelsvennootschap "Norma" N.V. v. Kennedy. (C.A.D.C., January 23, 1964). This was a suit brought under Section 9(a) of the Trading With the Enemy Act by a corporation of the Netherlands to recover property which had vested in 1946 and 1947 in defendant. Enemy occupation of the Netherlands ceased in 1945. Relying upon Handelsbureau La Mola v. Kennedy, 299 F.2d 923, certiorari denied, 370 U.S. 940, the district court dismissed the complaint. La Mola held that technical enemy status barred a Section 9(a) suit even if the property vested at a time when the enemy status had ceased. The Court of Appeals reaffirmed that position here in affirming the dismissal of the complaint.

Staff: Bruno A. Ristau and Morton Hollander
(Civil Division)

DISTRICT COURTS

FALSE CLAIMS ACT

"Intent to Defraud" Not Necessary Element to Constitute Violation of First Two Clauses of False Claims Act; Government Not Estopped From Bringing False Claims Act Suit on Basis That FHA Employee Advised That Defendant Should File Claims in Order to Determine Their Eligibility. United States v. Fox Lake State Bank (N.D. Ill. December 19, 1963). Defendant bank filed 21 claims with the Federal Housing Administration as a result of defaulted FHA Title I home improvement loans. Some of the proceeds of the home improvement loans had been used for other purposes, such as debt consolidation, in violation of 24 CFR 201.6(b) which requires that the proceeds of an FHA Title I loan shall be used only for property improvements. An ex-employee of defendant bank who had approved the loans had had knowledge that some of the proceeds of each loan were not to be used for home improvements; this same ex-employee received a $200. kickback for each loan which he approved. Each of the 21 claims contained a certification that the FHA regulations had been complied with.

According to the bank, officials of the Illinois Department of Financial Institutions and the Federal Deposit Insurance Corporation "demanded" that the bank file claims on the defaulted loans with the FHA. The bank also maintained that certain officials of the FHA informed it (the bank) that it must file

claims before the FHA could rule on their eligibility for payment.

The United States instituted a suit under the False Claims Act against the bank for filing false claims against the FHA and prayed for relief of double damages and 21 $2,000 forfeitures.

Defendant bank moved for summary judgment on the grounds that (1) the Government was estopped from bringing an action under the False Claims Act since the FHA had told it that it must file claims before the FHA would rule on their eligibility, and (2) the bank had no "intent to defraud" since the bank was only doing what officials of the Illinois Department of Financial Institutions, the FDIC, and the FHA, said had to be done. The Government opposed the motion on the grounds that, inter alia, (1) even if an FHA employee told the defendant bank that it should file claims, this did not mean false claims, and, if it did mean false claims, such an "authorization" was outside the scope of the employee's authority, and (2) "intent to defraud" is not a necessary element in establishing a violation of the first two clauses of the False Claims Act pursuant to which the United States brought suit.

The Court, in dismissing the bank's motion for summary judgment, upheld the Government's position on both grounds. Especially significant is the fact that this is the first court decision which specifically states that the language, often quoted by defendants in False Claims Act actions, in the cases of United States v. Park Motors, 107 F. Supp. 168 (E.D. Tenn.), Cahill v. Curtis Wright Corp. 57 F. Supp. 614 (W.D. Ky.), United States v. Schmidt, 204 F. Supp. 540 (E.D. Wis.), and United States v. Goldberg, 157 F. Supp. 544 (E.D. Penn.), to the effect that "intent to defraud" is a necessary element to a False Claims Act judgment, is dicta and therefore not controlling. Thus the Court followed U.S. v. Toepleman, 141 F. Supp. 677, 683 (E.D. N.C.), which states that "it is unnecessary to show either an intent to defraud or resulting damage."

Staff: United States Attorney Frank McDonald;
Assistant United States Attorney Thomas W. James (N.D. Ill.)
John E. Archibold (Civil Division)

TORT CLAIMS ACT

Volunteer Hospital Worker's Right to Compensation Under Federal Employees Compensation Act Bars Suit Under Federal Tort Claims Act. McNicholas v. United States, (N.D. Ill., January 13, 1964). Plaintiff was injured while she was at a Veterans Administration Hospital with a group of ladies providing entertainment for the hospital patients. The Court, in granting the Government's motion to dismiss, concluded that even though plaintiff was not compensated for her services, since the Administrator of the Veterans Administration was authorized by law (38 U.S.C. 233 (3)) to accept such volunteer services, she was included as an employee within the coverage of the Federal Employees Compensation Act (5 U.S.C. 790(b)(2)). As an employee of the United States to whom the Federal Employees Compensation Act is available, plaintiff was precluded from recovery under the Federal Tort Claims Act.

Staff: United States Attorney Frank E. McDonald (N.D. Ill.);
J. Charles Kruse (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections: Civil Rights Acts of 1957, 1960. United States v. Wilbur G. Ward, et al. C.A. #2540 (S.D. Miss. D.J. File 72-41-36). On April 16, 1962, a suit was brought under 42 U.S.C. 1971(a)(e) against the Circuit Court Clerk and Registrar of George County, Mississippi, and the State of Mississippi. It is charged in the complaint that in that county there are about 5,276 white persons of voting age, of whom a substantial majority are registered to vote, and 580 negroes, of whom about 10 are registered to vote. Application of different and more stringent standards to Negro applicants for registration than to white applicants and unreasonably delaying the receipt of Negroes' applications are among the discriminatory practices charged against the defendants.

Temporary restraining order issued by Judge Cox on April 21, 1962. By agreement of all parties, the temporary restraining order remained in effect until the trial on the merits, and a pre-trial conference was held on April 5, 1963. The Court directed the attorneys for the defendants to obtain a review by the County Election Commission of the rejected Negro applicants since April 24, 1962. The County Election Commission advised the Court by mail that its members believed that they had no power to take such action in the absence of an appeal by rejected applicants.

During December, 1963, the Court set the trial date of January 27, 1964. On January 24, 1964, Wilbur G. Ward, the newly elected circuit court clerk and registrar of George County was, over the objections of the attorneys for the defendants, substituted as a defendant in the case for Eldred W. Green, the retiring registrar.

The case was tried in Biloxi, Mississippi on January 27 and 28, 1964. At the conclusion of the trial, the district judge gave attorneys for all parties fifteen days to submit independent briefs. The Government's brief was submitted on February 12, 1964.

Staff: United States Attorney Robert E. Hauberg (S.D. Miss.)
John Doar, D. Robert Owen, Frank E. Schwelb
(Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

IMMUNITY UNDER NARCOTIC CONTROL ACT

Requests For Authorization to Make Application For Immunity Under Narcotic Control Act (18 U.S.C. 1406). Requests for immunity require detailed processing by the Criminal Division and personal consideration by the Attorney General. The Criminal Division prepares a detailed memorandum setting forth the details and circumstances surrounding the request for the benefit of the Attorney General. Therefore, a minimum of two weeks should be allowed for consideration of immunity requests.

In order for the Division adequately and expeditiously to process each request, all applications should contain the following information:

1. Name of individual for whom immunity is requested.

2. Date and place of birth, if known.

3. FBI number or local police number, if known.

4. Statement of pending Federal and State charges in which the subject of the request is a defendant.

5. The subject's relative importance in the narcotics activity in your area.

6. Reasons for the request including a statement as to what testimony you expect the subject to give and in what way this testimony will serve the public interest.

Should the immunity authorization be granted, the United States Attorney will notify the Criminal Division as to whether immunity was, in fact, granted by the Court, the nature of the information or testimony received after the grant of immunity, and the ultimate disposition of the case or matter.

NARCOTICS

Identity of Purchaser Not Element of Offense Under 26 U.S.C. 4705(a); Where Identity Appears in Record Though Not in Indictment, Defendant Is Fully Able to Plead Conviction as Bar to Subsequent Prosecutions For Same Offense; Failure of Indictment to Name Purchaser Not Defect Subject to Collateral Attack Under 28 U.S.C. 2255. Clay v. United States (C.A. 10, # 7467, D.J. File 144-60-106). Appellant Clone S. Clay was convicted under a three-count indictment and a one-count information for four unlawful sales of narcotics in violation of 26 U.S.C. 4705(a), and was sentenced to four consecutive ten-year terms. The present appeal from a denial without a hearing of his motion under 28 U.S.C. 2255 is Clay's second appeal to the Tenth Circuit after three unsuccessful attempts in the trial court to invalidate the sentences imposed. The only points raised on this appeal were the sufficiency of the indictment and information which appellant contends are insufficient because the phrase "District Director" rather than the

statutory language "Secretary or his delegate" is used in charging failure to secure a written order from that official, and because in each count the name of the person to whom the narcotics were sold is not shown.

After disposing of the first objection as technical and of no possible prejudice to defendant, the Court discussed appellant's second argument, which relied upon the recent Seventh Circuit case of Lauer v. United States, 320 F. 2d 187 (1963). That case held the identity of the purchaser of narcotics was a factor central to the prosecution, of which the accused was entitled to be apprised by the indictment, even though it is not an actual element of the offense under 26 U.S.C. 4705(a). The Tenth Circuit held that since the only elements of the statutory offenses were: (a) the selling of illicit narcotics; and (b) not pursuant to written order form, the indictment could not be considered defective for failure to allege an offense. Nor were the charges defective in failing to apprise the appellant of what he must be prepared to meet at the trial, because he pleaded guilty and is shown by the record to have been fully aware of the nature of the charges against him.

The Court found Clay's strongest argument to be that he would be unable to plead this conviction as a bar to subsequent prosecutions for the same offense inasmuch as the identity of the purchaser was not shown in the indictment and information. Because the record at the sentencing hearing disclosed the identity of the purchaser, and defendant could rely upon the entire record if faced with any subsequent prosecution for the same offense, the Court found defendant to be fully protected in his ability to establish a defense of former jeopardy, and affirmed the sentencing court's denial of his motion under 28 U.S.C. 2255.

This opinion specifically declines to indicate whether an indictment would be fatally defective if neither it nor the record disclosed the identity of the person to whom the narcotics were sold, indicating the desirability of getting into the record at some point the purchaser's identity.

Staff: United States Attorney B. Andrew Potter; Assistant United States Attorney Jack R. Parr (W.D. Okla.).

BANK ROBBERY

(18 U.S.C. 2113)

Forcing Bank Official to Take Money From Bank Under Threats of Harm to Family; Suggestions for Prosecution. In recent years bank officials have received an increasing number of demands directing them to take money from their respective banks and to deliver it to someone away from the bank's premises or to take it to a designated place under threats of harm to their wives or to some other member of their families. Such demands may be made by telephone, written notes, and in person, such as where the bank official is accosted at his home or on the street.

The first paragraph of Section 2113(a) prohibiting robbery might be considered applicable if the bank official delivers the money to the person demanding it, provided that the threats constitute intimidation within the meaning of the statute, and the money belongs to the bank or is in the care, custody, control, management, or possession of the bank in contemplation of law. The

word "intimidation" first appeared in the 1948 revision and codification as merely a change in the previous phraseology, "putting in fear." In the majority of cases the phrase "putting in fear" within the meaning of the law of robbery has been defined as fear of some immediate bodily harm or physical injury to the victim being robbed. 35A Words and Phrases 356-57; 77 C.J.S., Robbery, Section 16. In Lanford v. Commonwealth, 209 Ky. 693, 273 S.W. 492 (1925), however, the Court stated that the fear which will make a felonious taking robbery need not necessarily be fear of bodily harm, but may be fear of injury to the victim's property, and in some cases, to his reputation. See also 54 C.J. Section 38 at p. 1022, citing Lanford, supra, and two English cases, one involving threats to tear down growing corn and to level house; the other involving threats to bring a mob and burn victim's house. Research has failed to disclose that Lanford, supra, has been cited for this proposition of law in any subsequent State or Federal case. The only two Federal cases involving a discussion of "intimidation" deal with factual situations in which there was evidence of fear of bodily injury. Norris v. United States, 152 F. 2d 808 (C.A. 5, 1946), cert. denied, 328 U.S. 850 (1946); United States v. Baker, 129 F. Supp. 684 (S.D. Cal., 1955). Neither case purported to rule that the intimidation required to establish robbery must be restricted to fear of bodily injury to the victim of the robbery.

If a threat to injure the victim's property suffices to establish intimidation, it would appear that threats to harm the victim's wife or child would also suffice. However, since it is difficult to determine if a Federal court will be persuaded by Lanford, supra, and the English cases referred to in 54 C.J. Section 38 at page 1022, it is recommended that a criminal charge under 18 U.S.C. 2113(a) only be used in connection with a charge under Section 2113(b) as hereinafter discussed.

Section 2113(b) prohibits the taking and carrying away, with intent to steal or purloin, money or property, belonging to, or in the care, custody, control, management, or possession, of a bank. The legislative history discloses that the Section merely requires a taking and carrying away of the money or property without qualification as to the place from which it is taken. The legislative history further suggests that the phrase "belonging to" was meant to denote ownership, a proprietary interest, while the phrase "in the care, custody, control, management, or possesstion of" was meant to denote something less, such as an agency or bailee for hire relationship with the title ownership in someone else. Cf. United States v. Jakalski, 237 F. 2d 503 (C.A. 7, 1956), cert. den. 353 U.S. 939 (1957); White v. United States, 85 F. 2d 268 (C.A.D.C., 1936). Even if the bank official's act is deemed a conversion, his tort merely affects possession and not title. 89 C.J.S., Trover and Conversion, Section 3, page 533. Although the bank official's act may be deemed sufficient to remove the money from the care, custody, control, management, or possession of the bank, it still belongs to the bank, whose title and ownership is unaffected.

It may also be argued that when the person demanding the money forces the bank official under threat of harm or injury to his wife or a child to take money from the bank, he, in contemplation of law, makes the bank official his agent and instrumentality for perpetrating a crime and is responsible therefore to the same extent as if he, himself, were physically in the bank and performed the acts. The taking of the money is not of the bank official's own volition but is done at the caller's direction, and clearly, in the language of Section 2 of Title 18, United States Code, the person demanding the money commands, induces, and

procures the act by the bank official through threats and duress. Cf. Bearden v. United States, 320 F. 2d 99 (C.A. 5, 1963); Richardson v. United States, 181 Fed. 1 (C.A. 3, 1910).

It is recommended that, if the money is physically delivered by the bank official to the person demanding it under these circumstances, a two count indictment be returned charging both a violation of the first paragraph of Section 2113(a) and of the appropriate paragraph of Section 2113(b) depending on the amount of money taken. If the money is merely left at a designated place, it is recommended that only the appropriate paragraph of Section 2113(b) be used.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Labor Union and Individual Workers Have No Legal Standing to Challenge Immigration Status of Alien Commuters. Texas State AFL-CIO et al. v. Robert F. Kennedy; C.A.D.C., No. 17,976; February 6, 1964. Plaintiff-appellants are a labor organization and 188 workers employed in Texas near the Mexican border. They brought this action in the District Court for the District of Columbia against the Attorney General and the Commissioner of the Immigration and Naturalization Service contending that these officials were illegally permitting Mexican nationals, residing in Mexico, to commute daily to employment in the United States. Seeking to protect their immigration status, several alien commuters intervened in the action. The lower Court granted the defendant-appellees' motion to dismiss and this appeal followed.

The appellate court declined to pass on the merits of the controversy, namely, whether the Immigration and Naturalization Service had authority under the immigration laws to accord alien commuter status. After assuming the truth of the allegations of the complaint that plaintiffs would benefit from the exclusion of the alien commuters and that the latter were employed in the United States only because the Government officials had illegally permitted them to enter to work, the appellate court concluded that this was not enough to give appellants legal standing to sue for declaratory and injunctive relief. The Court found that the alien commuters were entitled to have their status and rights adjudicated on the facts of their particular cases and that any challenge to their status should normally be brought by Government officials. The Court stated that it would be most unjust to allow a labor organization and its members to attack the status of many thousands of aliens - not even naming them as individual defendants - with the aim of dislodging them from their jobs so that those jobs might then perhaps be obtained for union members. The appeal was dismissed.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Frank Q. Nebeker, David Epstein, and Gil Zimmerman (Dist. Col.); Of Counsel: Maurice A. Roberts (Criminal Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation: Awards Within Range of Valuation Testimony; Inadmissibility of Amount of Deposit; Inadmissibility of Settlement With Government Witness; Qualification of Government Employee to Testify; Preservation of Ground for Appeal. Evans v. United States and Parker v. United States (C.A. 8, Nos. 17417 and 17418, Jan. 30, 1964, DJ File 33-28-135-843). Parts of two farms were condemned for a dam project. The jury awards were within the range of the valuation testimony but below the deposits of estimated compensation. The district court sustained the Government's objection to the landowners' offer of proof of the amount for which one Government witness had settled with the United States for land taken for this same project. The landowners appealed, alleging inadequacy of the awards and error in rejection of the offer of proof.

The Court of Appeals affirmed, stating that awards within the range of conflicting valuation testimony "may not be disturbed by this court as being allegedly inadequate," even though closer to the Government's valuation testimony. Referring to the attempted use of the deposits, the Court accumulated the authorities and said: "The deposit of estimated compensation by the government is 'no evidence of value' and has 'no bearing whatsoever on value.' [Citations omitted.] Nor, for that matter, does the deposit of estimated compensation by the government establish a minimum for an award."

It approved rejection of the landowners' offer of proof of settlement as inadmissible to establish value and also as defective to show bias and prejudice because no foundation as to comparability of the lands involved had been laid. After stating the rule that the weight to be accorded testimony is for the trier of facts whose determination is conclusive on appeal absent abuse of discretion or clear error of law, the Court noted that the record showed no effort by the landowners to disqualify the Government's witnesses and that employment by the United States does not constitute legal disqualification to testify to market value.

Staff: Raymond N. Zagone (Lands Division)

Public Lands: Mineral Leasing Act; Rejection of Lease Applications Because Land Previously Leased to Qualified Applicants; Prior Commitment to Unit Plan. Miller v. Udall, No. 18029, C.A. D.C., Feb. 7, 1964 (D. J. File 90-1-4-79). Miller sought judicial review of decisions of the Secretary of the Interior rejecting applications for noncompetitive mineral leases on the public domain. Miller's applications were rejected, in each instance except one, because a lease had previously been issued to a qualified applicant. In the one other instance, the application was rejected because the existing lease did not expire but was continued in force and effect beyond its expiration date by commitment to a unit plan as provided in § 17(b) of the Mineral Leasing Act.

The Court of Appeals, without an opinion, affirmed judgment for the Secretary of the Interior, relying upon three cases that sustained the Secretary's interpretation of his regulations.

Staff: Richard N. Countiss (Lands Division).

Public Lands: Mineral Leasing Act; Rejection of Lease Applications Because Land Previously Leased to Qualified Applicants; Rejection of Lease Applications for Failure to Comply With Departmental Regulations. Miller v. Udall, No. 18116, C.A. D.C., Feb. 7, 1964 (D.J. File 90-1-4-80). Miller sought judicial review of decisions of the Secretary of the Interior rejecting his applications for noncompetitive mineral leases on public and acquired lands. In each instance except one, Miller's applications were rejected because a lease had previously been issued to a qualified applicant. In the other instance, his applications for unsurveyed public lands were rejected for failure to comply with the regulation requiring an accurate description of the lands by metes and bounds connected to some monument of an approved public land survey.

The Court of Appeals, without opinion, but citing three cases which support the proposition that administrative actions of the Secretary of the Interior will not be disturbed unless clearly wrong, affirmed judgment for the Secretary.

Staff: Grace Powers Monaco (Lands Division).

Damages to Federal Property; Charitable Immunity; Absolute Liability of Agent for Removing Lateral Support of Land in Natural Condition. United States v. Baptist Golden Age Home, Inc., (W.D. Ark., Jan. 22, 1964, D.J. File 90-1-23-949). The United States brought action against the defendants, Baptist Golden Old Age Home, Capital Construction Company and Tri-State Insurance Company for $4,848.40, which represented the cost of repairing and restoring Hot Springs National Park land that collapsed when defendant Capital Construction Company removed its lateral support in making an excavation for a hotel being built by defendant Baptist Golden Old Age Home, Inc.

Judge Miller ruled that defendant Capital Construction Company was absolutely liable as an agent for removing the lateral support of land in its natural condition. He further ruled that Arkansas statutes allow a direct suit against a charity's insurance company, when the defendant has charitable immunity and held defendant Tri-State Insurance Company liable on its surety bond for any damages resulting to the United States from inadequate construction. The Court rejected defendant insurance company's argument that it could not be held liable on its surety bond, because the landowner had charitable immunity, on the grounds that the Arkansas statute allowing direct suit against a charity's insurance company prevents it from using the charitable immunity of its insured as a defense.

On the issue of damages, Judge Miller ruled that the United States was entitled to the cost of repairing or restoring the land even though it was considerably higher than the land's market value, when the damages are of a temporary nature that are reasonably subject to repair or restoration. In ruling that the United States could obtain the higher cost of repair, the court relied on 16 U.S.C. 1, which places the National Park Service under a statutory duty to maintain and conserve the National Parks so as to "leave them unimpaired for the enjoyment of future generations," and on the congressional policy not to sell National Park land or allow it to be destroyed without requiring the defendant to pay the cost of repairs.

The jury found that the damages to the land were temporary, so as to be subject to repair or restoration, and returned a verdict of $5,556. This amount was 15% above our original claim, because the testimony developed at the trial indicated that additional erosion and the increased cost of labor had added that amount to the original estimated cost of repair.

Staff: Assistant United States Attorney E. A. Riddle (W.D. Ark.); John J. Schimmenti (Lands Division).

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Decision

Attorney-client Privilege; Grand Jury Subpoenas. United States v. Goldfarb (C.A. 6, February 5, 1964). D.J. No. 5-37-2088. Goldfarb, an attorney, was subpoenaed to testify before a grand jury which was investigating the tax liabilities of one Charles Sherman. Goldfarb represented the other party in a real estate transaction with Sherman, and he refused to answer questions which related to discussions between Goldfarb and either Sherman, Sherman's attorney, or other of Sherman's agents. This refusal was based on the attorney-client privilege.

The district court ordered Goldfarb to answer, overruling his claim of privilege. Goldfarb still refused to answer, and was ordered to be committed for contempt until he complied. The commitment was stayed pending appeal.

On appeal the Sixth Circuit affirmed. They held that inasmuch as the subject questions would not force Goldfarb to reveal any communications from his client, the privilege was inapposite. The Court specifically rejected Goldfarb's argument that the privilege should be extended to information received by an attorney from a third party in the course of his professional employment.

Staff: United States Attorney Lawrence Gubow and Assistant United States Attorney Paul J. Komives (E.D. Mich.).

CIVIL TAX MATTERS
Appellate Decision

Civil Procedure; Change of Venue; Court Has Power to Transfer Collection Action in Absence of Personal Jurisdiction Over Defendant; Order Denying Transfer is Reviewable by Appeal Under Circumstances. United States v. Berkowitz (C.A. 3, February 5, 1964). D.J. No. 5-62-2538. In a collection suit filed in the Eastern District of Pennsylvania seventeen days prior to the expiration of the statute of limitations, defendant established that he had moved to New York and that service on an individual at defendant's former address in Philadelphia (which was the address last known to I.R.S.) was consequently ineffective. The Government filed separate motions to transfer under Sections 1404(a) and 1406(a) of Title 28 U.S.C., both of which were denied. As to the motion under Section 1404(a), which permits a discretionary change of venue for the convenience of parties and witnesses, the District Court determined that it lacked power to transfer because it had not acquired personal jurisdiction over the defendant. The Third Circuit reversed on authority of Goldlawr v. Heiman,

369 U.S. 463 (1962), which had found personal jurisdiction over the defendant not necessary to effect a transfer under Section 1406(a). The Court felt that the rationale of Goldlawr applies equally to Section 1404(a), since these are companion sections, remedial in nature, and both aimed at removing obstacles that may impede an expeditious and orderly adjudication of cases on their merits.

The District Court's denial of the motion to transfer under Section 1406 (a), which permits transfer of "a case laying venue in the wrong division or district," was based on reasoning that, since the tax liability arose in the Eastern District of Pennsylvania and 28 U.S.C. 1396 allows a collection suit to be brought in the district where the liability accrues, this was not a case laying venue in the wrong district. In reversing the District Court on other grounds, the Third Circuit did not reach the Government's alternative contention under Section 1406(a) that venue here was laid in the wrong district because defendant was not amenable to service there.

In addition to filing notices of appeal the Government filed a precautionary petition for a writ of mandamus to compel the District Court to exercise its discretion to transfer the action. The Third Circuit held that appeal was the proper method of review. Although several Circuit decisions have held that an order granting or denying a motion to transfer is interlocutory in nature and hence not appealable, the Court decided that the orders here were more in the nature of "final decisions" under 28 U.S.C. 1291, in view of the fact that the statute of limitations would effectively preclude a new suit elsewhere.

Defendant reportedly is considering filing a petition for rehearing to urge the Court of Appeals to rule on the Government's alternative contention under Section 1406(a).

Staff: Joseph Kovner and Robert Bernstein (Tax Division)

District Court Decisions

Liability for Withholding Taxes: Surety on Subcontractor's Performance Bond Is Not Employer Within Meaning of Code Section 3401 and Not Responsible For Tax Liability of Subcontractor. General Insurance Company of America v. Earl R. Wiseman (W.D. Okla., December 23, 1963) 64-1 U.S.T.C. par. 9166. On February 3, 1959, Central Asphalt Paving Company entered into a subcontract with Farnsworth and Chambers Company, Inc., of Houston, Texas, to perform certain work at Tinker Air Force Base. On February 3, 1959, Central as principal, and the plaintiff, General Insurance Company of America, as surety, executed a performance and payment bond to Farnsworth and Chambers, the obligee. Central became unable to meet its obligations to laborers and materialmen and plaintiff supplied money to meet these obligations by means of a joint control bank account. Both plaintiff and Central signed all the checks drawn on the account. This arrangement went on from October 9, 1959 to December 7 or December 12, 1959. During this time, a tax liability of $1,683.33 accrued. However, plaintiff exercised no control or supervision over the employees of Central while tax accrued. Defendant, Wiseman, District Director of Internal Revenue, assessed against plaintiff a claim of $1,683.33 for taxes incurred during the above period. Plaintiff paid under protest and then applied for a refund but it was disallowed by defendant.

The Court held that the tax was improperly assessed against plaintiff who was not required to collect, account for, or pay over the tax which had accrued. Plaintiff was not an employer of Central within the meaning of 26 U.S.C. 3401. Furthermore, defendant is not a third party beneficiary under the bond or subcontract in question. Therefore, the surety company was not liable for withholding taxes which accrued during the period when the surety company supplied money to the subcontractor to meet his obligations by way of a joint bank account.

Staff: United States Attorney B. Andrew Potter and Assistant United States Attorney Leonard L. Ralston (W.D. Okla.); and Sherin V. Reynolds (Tax Division)

Community Property: Taxpayer-spouse's Interest in Community Property in State of Washington Cannot Be Reached to Satisfy His Separate Premarital Tax Liability. Clifford A. Stone, et al. v. U.S., et al. (W.D. Wash., December 31, 1963) CCH 64-1 USTC par. 9204. Clifford A. Stone is indebted to the United States for income tax for the calendar year 1954. An assessment for the tax was made on May 31, 1956, and a notice of tax lien was filed on July 19, 1957. Stone incurred his tax liability as a single man, and married on June 11, 1955. The District Director of Internal Revenue served a notice of levy upon Stone's employer, Allied Manufacturing Corporation, a Washington corporation, on March 20, 1963, levying upon all property and rights to property belonging to Stone from the corporation (his wages). In addition, the Stones own certain real property located in Washington to which the federal tax lien attached. They brought suit as a marital community seeking to enjoin the United States and the District Director from levying upon Stone's salary on the ground that it constituted community property and as such was not subject to levy and seizure by defendants in satisfaction of his separate premarital tax liability. Plaintiffs also prayed for an order quieting title to the real property owned by them as a marital community. The United States filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The motion was based on the Government's position that taxpayer did have a property interest in the community property to which the federal tax lien did attach because under Washington law each of the spouses has a present, vested undivided one-half interest in their community property and that this interest constitutes a property right. Though Washington law further provides that community property is not liable for either spouse's separate, noncommunity debts, when the action giving rise to the debt was not for the benefit of the community, the Government contended that this immunity of the community property constituted a state-created exemption, not binding on the United States under the rationale of United States v. Bess, 357 U.S. 51. The Court, however, ruled that in the light of the historical development of the community property concept under Washington law and the public policy supporting it, upon a hearing on the merits it could readily find that the character and extent of Stone's undivided interest in the community property involved was such as to make it, by virtue of its inherent nature, immune from seizure under a federal tax lien arising out of his separate tax obligation, because of the character of the "property" as "rights to property" created under the state law of Washington.

Staff: United States Attorney Brockman Adams; Assistant United States Attorney Payton Smith (W.D. Wash.).

Notice of Levy; Federal Tax Liens Enforced Against Cash Surrender Value of Life Insurance Policies on Date of Surrender of Policies Pursuant to Judgment. United States v. John P. Whatley, et al. (S.D. Ala.) CCH 64-1 USTC par. 9212. On December 6, 1963, the District Court entered judgment in favor of the United States and against taxpayer, John P. Whatley, in the amount of the outstanding tax liability, $1,505.82 plus interest, and requiring defendant insurance companies to pay over the net cash surrender value of the two policies involved, computed to the date of their receipt by the Clerk pursuant to judgment. The United States has been paid $1,743.80 in satisfaction of the judgments against the two insurers, whereas the cash surrender value of the two policies on the dates of service of notice of levy totaled only $1,689.

The Court expressly stated that the result here was controlled by United States v. Louis H. Mitchell, et al., 210 Supp. 810 (S.D. Ala. 1962), which is presently on appeal to the Fifth Circuit. Thus, the decision ignores entirely the legal effect of service of notices of levy on the two insurers in March 1960 -- without prejudice to the Government, however, since there were no automatic premium loans applicable against the cash surrender values after levy. In Mitchell such loans subsequent to levy effectively consumed the cash surrender value of the policies. Here the cash surrender values increased, rather than decreased, subsequent to levy. Accordingly, even though the decision follows the adverse precedent of Mitchell, its effect is nugatory in the circumstances and without injury to the Government's position before the Fifth Circuit in Mitchell.

Staff: United States Attorney Vernol R. Jansen, Jr. (S.D. Ala.); Charlotte P. Faircloth (Tax Division)

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