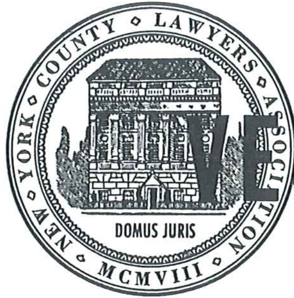

VESEY STREET LETTER

A PUBLICATION OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION
14 VESEY STREET, NEW YORK, N. Y. 10007

Editor: RICHARD P. ACKERMAN

The next issue of the VESEY STREET LETTER will appear in November, 1973.

May 1973

NEWS OF INTEREST TO THE BAR

FBI records detailing its investigation of President Kennedy's assassination for the Warren Commission may for the first time be open to public scrutiny. The United States Court of Appeals for the District of Columbia Circuit has ruled that the Justice Department can no longer prevent disclosure under the Freedom of Information Act's exemption of "investigatory files compiled for law enforcement purposes."

The court declined to interpret the exemption as a conferment of immunity, *ipso facto,* to all investigatory files. Noting that there are presently no civil or criminal actions pending which relate to the Kennedy assassination, the court held that the withholding agency, in order to bar disclosure, must demonstrate that the information sought would impair law enforcement efficiency in some tangible way. [*Weisberg v. U.S. Dept. of Justice,* 41 U.S.L.W. 2470 (2/28/73).]

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A unanimous New York State Court of Appeals, in an opinion by Chief Judge Stanley H. Fuld, has rejected various due process and equal protection attacks on New York City's Unincorporated Business Tax on self-employed professional incomes, holding that Local Law No. 36, of 1971, "is in all respects valid and constitutional."

The court, briefly disposing of the due process claim, stated that the clause does not avail against the taxing statute; it is not so arbitrary as to compel the conclusion that it constitutes " 'in substance and effect, the direct assertion of a different and forbidden power, as, for example, the confiscation of property.' " [*Magnano Co. v. Hamilton,* 292 U.S. 40, 44.]

Addressing itself to the plaintiffs' prime equal protection argument, *i.e.,* the tax was imposed on the earnings of self-employed taxpayers but not applied to the earnings of salaried employees, the court emphasized that legislatures have their greatest freedom of classification in the area of taxation. The classification of income according to its source (here, earned income as against profits) is not uncommon, and is employed extensively in federal taxation. Further, the classification may not be said to be arbitrary since the classes are not similarly situated functionally or vis-à-vis their respective needs for governmental services. In sum, the opinion incorporates the language of the United States Supreme Court [*Salomon v. State Tax Comm.,* 278 U.S. 484, 491-92.]: " 'The fact that a better taxing system might be conceived .... does not render the law invalid .... [M]inor inequalities and hardships are incidents of every system of taxation.' " [*Shapiro v. The City of New York,* N.Y.L.J. (3/26/73) at 1, col. 6.]

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A majority of the Tax Court has approved a scheme whereby a taxpayer was able to obtain a large depreciable interest in valuable property without any capital investment and without incurring any personal liability. The taxpayer formed a shell corporation which purchased desirable properties with funds obtained from the sale of its own notes secured by no-personal-liability mortgages. The corporation leased the buildings (sometimes back to the seller) at rentals equal to 100% of the financing charges. The lessee made payments directly to the mortgagee in satisfaction of the notes. The corporation then conveyed title to the taxpayer and other shareholders who purchased the property for a nominal consideration "subject to" the mortage without assuming personal liability.

The Tax Court concluded that the corporation was at all times a separate viable entity for tax purposes, and that the conveyances transferred the depreciable interests in the properties to the shareholders. The court determined that under the *Crane* doctrine [*Crane v. Comr.,* 331 U.S. 1 (1947).], the unpaid balance of the mortgage at

the time of the transfer was included in the taxpayer's depreciable basis. [*Bolger,* CCH Standard Federal Tax Reports ¶ 7283 (3/8/73).]

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A defendant, convicted of criminal contempt for refusing to answer questions before a grand jury, *solely* on self-incrimination grounds, after having received transactional and testimonial immunity, may not, on appeal, offer as a defense that he would not have been subpoenaed had it not been for evidence obtained in an illegal search and seizure. The New York State Court of Appeals has held that, under such circumstances, the defendant has waived any other grounds for refusing to testify and an omitted ground may not subsequently be availed of by way of defense. The case does not, therefore, reach the more difficult question, whether the defendant could have been convicted of a contempt had the objection to the illegal search been timely invoked. [*People v. DeSalvo,* N.Y.L.J. (3/30/73) at 1, col. 7.]

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The United States District Court for Southern New York has denied a motion to dismiss a class action on behalf of possible female applicants for employment with a local law firm. The suit charges the firm with sex discrimination in violation of Title VII of the 1964 Civil Rights Act.

The firm unsuccessfully argued that the class was overbroad since it extends offers to only a small percentage of the total number of applicants and therefore the number of female applicants actually eligible for class membership should be correspondingly limited. The court stated that the alleged discrimination handicapped the entire proposed class "although not all could have been employed." The court similarly rejected the argument that the exigency in evaluating prospective professional employees is such that unique questions of fact would, in each case, be presented. The issue involved is the alleged sex discrimination which is a question common to each member of the proposed class. [*Kohn v. Royall, Koegel & Wells,* N.Y.L.J. (3/8/73) at 1, col. 5.]

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Chapter 382, Laws of 1972, which provided for the creation of a New York City Civil Court Housing Part, has been amended so as to change the effective date of such Chapter from April 1, 1973, to July 1, 1973. [Chapter 126, Laws of 1973 (3/30/73).]

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An unsuccessful tender offer contestant's standing to sue the winning offeror, the winner's underwriter and control persons of the target corporation under the antifraud provisions of section 14 (e) of the SEA has, for the first time, been upheld by the United States Court of Appeals for the Second Circuit. The court found that the defendants had made certain material misstatements and omissions concerning the tender offer which prevented the plaintiff from acquiring sufficient stock to establish control of the target corporation. This resulted in compensable injury, stated the court, but it declined to set aside the District Court's refusal to permanently enjoin the successful offeror from federal securities laws violations. [*Chris-Craft Industries, Inc. v. Piper Aircraft Corp.,* 41 U.S.L.W. 2505 (3/16/73); *Chris-Craft Industries, Inc. v. Bangor Punta Corp.,* CCH Federal Securities Law Reports ¶ 93,816.]

The collector's value, rather than the intrinsic value, of Lee Harvey Oswald's personal effects seized by the FBI following President Kennedy's assassination has been awarded to Oswald's widow by the United States Court of Appeals for the Fifth Circuit. The court stated that its function upon condemnation is limited to assessing the value of the interest taken. It concluded that the accretion in value incident to the collectors' demands was a necessary element in restoring the owner to the same position financially as she would have been in had the property not been taken. The court, however, determined the value as of the date the government published its intention to acquire the property in the Federal Register and not, as requested, as of the moment following the assassination, before the property was damaged by chemical testing and before excerpts were published by the Warren Commission. [*Porter v. U.S.,* 41 U.S.L.W. 2471 (2/26/73).]

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Payments to a medical partnership's retirement fund in return for services rendered to a non-profit health plan have been held, by the United States Supreme Court, to be currently taxable income to the partners notwithstanding that they had no presently vested rights to the proceeds of the fund. The decision, which reverses a federal appellate court holding to the contrary, is founded on two principles: first, that tax on income may not be avoided by anticipatory assignment; and, secondly, partners are taxed according to their proportionate share of the partnership income irrespective of the fact that it may never be distributed to them. [*United States v. Basye,* CCH Pension Plan Guide ¶ 20,270 (3/8/73).]

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An NLRB arbitrator has held that employee insubordination may be justified by the misconduct of a supervisor. The case involved two employees who had been terminated for refusing to follow work instructions given them by their foreman. The union filed a grievance and claimed extenuating circumstances, *viz.,* that the foreman had been drinking and receiving women on the plant premises and that he had generally neglected his supervisory duties. The arbitrator held that the

employees' insubordination might have arisen out of a lack of respect engendered by the foreman's personal conduct. He noted that the employees ultimately carried out the work order when given by the foreman's supervisor and ordered their reinstatement. [*Schott's Bakery*, BNA Labor Relations Reporter, Vol. 82, No. 19, at 8 (3/5/73).]

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Reversing a Tax Court ruling, the United States Court of Appeals for the Second Circuit holds that the expenses of an advertising and promotional campaign to develop a wholesale market for the sale of Loft candy were deductable as ordinary business expenses and were not made to acquire a capital asset. Per a plan to retain customers who had moved to the suburbs, Loft established a separate franchise division which, through advertising and solicitation, secured numerous franchise contracts with independently operated retail outlets. The Tax Court had ruled that, since the expenses were directed at establishing new channels of distribution, they were not "ordinary." This, noted the Second Circuit, is "a most unjust and unequal interpretation of the law. . . ." [N.Y.L.J. (3/14/73) at 1, col. 5.]

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Under the Freedom of Information Act, the IRS has been required to declassify a list of "prime issues" that it will litigate. Included are: whether fees for seeking (versus securing) employment are deductable; whether residential property has been converted to rental property when it is only offered for sale; whether nonstatutory compensatory options have a readily ascertainable fair market value; and whether an employee benefit plan that qualifies for exemption when adopted, but fails to meet the requirements in its operations, loses its qualification under code section 401. [CCH Standard Federal Tax Reports ¶ 6527.]

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The IRS has recently released statistics indicating that collections for fiscal '72 increased by $18.3 billion over the preceding year. The figures, following, are expressed in millions of dollars:

Source	*1971*	*1972*
Corporation income taxes. . . .	30,320	34,926
Individual income & employment taxes	140,671	152,593
Estate & gift taxes	3,784	5,490
Excise taxes	16,872	16,847
Total	191,647	209,856

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A per se violation of the antitrust laws, consisting of resale price restrictions in the pharmaceutical field, has shielded five defendants from criminal charges for fraudulently inducing the culpable firms to sell them drugs at reduced prices. The indictment was founded on the defendants' attempts to avoid the illegal condition and, rules the United States District Court for Southern New York, "fraud cannot be imputed to one in doing an act or a series of acts which he has a legal right to do." [*U.S. v. Boxer*, 41 U.S.L.W. 2487 (2/13/73).]

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Notwithstanding that an employee's grievance had not been submited in conformity to contractual grievance procedures, a municipal employer who failed to notify the employee of its decision on the grievance was held to have waived other procedural steps and ordered to proceed with arbitration. [*Federlein v. Noon*, CCH Labor Law Reports ¶ 53,006 (N.Y. Sup. Ct., Nassau Cty. 3/23/73).]

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The United States Court of Appeals at Cincinnati has enforced an NLRB order requiring an employer to pay striking employees the same bonus, with interest, that he had paid to nonstrikers as a reward for their loyalty at the conclusion of the strike. The Board had originally reasoned that the bonus interfered with the right to strike, and the court noted that there was really no practical alternative to the remedy directed. [*NLRB v. Aero-Motive Mfg. Co.*, CCH Labor Law Reports ¶ 13,474 (3/16/73).]

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Rejecting the requirement of a specific intent to defraud, the United States Court of Appeals for the Eighth Circuit holds that the Federal False Claims Act is violated by a negligently filed claim. Although the Act speaks of claims known to be false, "knowledge," insists the court, may be defined by reference to the law of misrepresentation.

Since the time of *Derry v. Peek* [14 A.C. 337, 58 L.J. Ch. 864 (1889).], American courts seem, however, to have preponderantly agreed that the requisite *scienter* is not present in cases of negligent misrepresentation and that these must be dealt with by other remedies. [*U.S. v. Cooperative Grain and Supply Co.*, 41 U.S.L.W. 2510 (3/15/73).]

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A writ of mandamus is not an appropriate method to obtain review of a pre-trial discovery order, rules the United States Court of Appeals for the Second Circuit. The writ is reserved for those extraordinary situations which compel early appellate intervention. An order preventing pre-trial discovery of certain civil defendants unless they receive immunity from use of the testimony in a contemplated criminal action does not present a sufficiently importunate case. The suit charges that the defendants participated in a scheme to loot IOS of nearly $224 million. [*SEC v. Stewart*, CCH Federal Securities Law Reports No. 471, at 4 (3/22/73).]

The FTC has concluded that certain corrective advertising copy which was supplied by the Commission in connection with a consent decree taken against a real estate developer is, itself, deceptive. The new opprobrium makes reference to HUD reports on the tracts being sold and urges would-be purchasers to consult a "Report . . . for a recently approved tract." Fearing that the public might misconstrue this as an endorsement by a federal agency, the FTC ordered respondents to show cause why the order should not be modified to read "Report issued for a tract in . . . ." [*Great Western United Corp.,* CCH Trade Regulation Reports ¶ 20,238 (3/5/73).]

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The New York State Court of Appeals has held that the expenses of a welfare recipient's divorce must be assumed by the county in which he resides. The ruling contemplates the cost of publishing notice as well as court costs. [*Patricia Deason v. Albany County,* N.Y.L.J. (3/23/73) at 1, col. 5.]

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New Yorkers who are unable to vote in a political party primary because of a state election law requiring eligible voters to enroll in a political party 30 days before the most recently preceding general election have not, according to the United States Supreme Court, been unconstitutionally disenfranchised. The Court finds that the statute serves a legitimate state purpose of discouraging party "raiding," and since it consists only of a time limit, with exemptions in exceptional cases, it is distinguishable from statutes which totally deny to a class the right to vote. [*Rosario v. Rockefeller,* 41 U.S.L.W. 4401 (3/21/73).]

PRACTICAL TIPS FOR LAWYERS

The Inter-American Bar Association will hold its XVIII Conference in Rio de Janeiro, Brazil, August 18-24, 1973. Any of our members planning to attend should contact our Executive Director Julius Rolnitzky. Additional information regarding the conference may be obtained directly by writing to IABA Executive Headquarters, 1730 K Street, N.W., Suite 315, Washington, D.C. 20006.

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Hastings College of the Law, University of California, and Loyola University School of Law, Los Angeles, will jointly sponsor the "1973 College of Advocacy," to be held at Hastings, July 29 through August 4, 1973. The course in civil trial advocacy will be presented by a faculty of over seventy-five trial lawyers, law school professors and members of the judiciary. The program registration fee is $250 and enrollment is limited. Further information and registration materials may be obtained from: Hastings Center for Trial and Appellate Advocacy, 198 McAllister Street, San Francisco, California 94102.

Northwestern University School of Law will conduct the "Short Courses for Defense Lawyers in Criminal Cases and for Prosecuting Attorneys." The course for defense lawyers will be held from July 16 to July 21 and the course for prosecutors from July 30 to August 4. The registration fee for each course is $200. Additional information and course programs may be obtained by writing: Professor Fred E. Inbau, Northwestern University School of Law, 357 East Chicago Ave., Chicago, Illinois 60611.

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Women's rights under the law will be the subject of a seven-week course this summer at the School of Continuing Education of New York University. Offered by the school's department of law and taxation, the course will cover women's legal rights regarding birth control, domestic relations, child care, the Constitution, employment, crimes, jury duty, public accommodations and the news media. Classes begin the week of June 4. Further information and a descriptive brochure may be obtained from the School of Continuing Education (212) 598-2127.

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BNA's "Housing & Development Reporter," a new bi-weekly reporting and reference service, is designed to provide lawyers and others interested in government subsidized building programs with "hard-to-get" reference materials, changes in laws, source documents, regulations, rules, program issuances, and agency directives. The report will, largely, focus on the increased state and industry involvement expected to attend recent federal government decisions to minimize its participation in some subsizied programs. Information may be obtained from: Frederick B. Tagg, Communications Mgr., The Bureau of National Affairs, 1231 25th St., N.W., Washington, D.C. 20037.

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A verbatim transcript of the Cleveland midyear meeting of the National Conference of Bar Presidents is now available for purchase. The meeting was attended by approximately 300 bar association presidents, presidents-elect and past presidents representing virtually every state and local bar association in the country. Transcripts are available at a cost of $2.00 and may be ordered from: National Conference of Bar Presidents, c/o American Bar Center, 1155 East 60th St., Chicago, Illinois 60637.

COMMITTEE NEWS

S. 1, 93d Cong., 1st Sess. (1973), which prescribes a recodification of the entire Federal Criminal Code, preserves the necessary counterbalance between the oft conflicting objectives of protection against crime and protection of individual rights. So reporting, the Committee on

Federal Legislation, Vincent L. Broderick, Chairman, has found the proposed legislation preponderantly to represent a "well-drafted and professionally competent recodification which contains notable improvements over . . . existing law . . . ."

Certain significant advances contained in S. 1 have been especially noted by the Committee for favorable consideration by Congress. Prime among these is the bill's systemization of the federal criminal code by striking overly broad and inconsistent provisions and by gathering previously scattered provisions in a logical fashion. Broadly, the bill makes further improvements: by not making the codified defenses exclusive; preserving the language of the most important statutes in shunning change for its own sake; permitting injunctive relief in cases of continuing criminal conduct and fines based on the amount of gain obtained or loss caused by the crime; and by extending the jurisdiction over the mail fraud statute to cover those cases where the use of the mails has been scrupulously avoided.

In certain areas the Committee expressed the opinion that additional amendments may be desirable. Several provisions remain overbroad (*e.g.*, in the areas of conspiracy and deprivation of the right to counsel); and provisions for "daily" fines, the requirement that prosecutors must make recommendations as to sentences in all cases, and the retention of the insanity defense in the face of increased flexibility in sentencing may ultimately prove counterproductive.

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For the first time in recent years, the national crime index total has remained constant and, indeed, evinces a significant reduction in N.Y. urban crime. However, several state legislators have seemingly sought to ensure the maintenance of this encouraging trend by proposing bills which would subject persons convicted of existing crimes to vastly more severe sentences. The Committee on the Criminal Court, Gregory J. Perrin, Chairman, has condemned much of this legislation as "anachronistic" and "regressive." A sampling follows:

An amendment to the penal law which would compel the imposition of the death penalty for conviction of the sale of a dangerous drug to a person under 18 years of age, provided one ounce of such drug were involved.

A statute mandating a minimum sentence of 40 years without eligibility for parole until at least 20 years have been served for conviction of criminally selling a dangerous drug in the first degree.

A statute requiring that anyone who commits certain specified crimes while armed with a firearm shall automatically be sentenced upon conviction to a mandatory consecutive sentence, the maximum of which shall be the maximum sentence for the crime committed.

Legislation seeking in effect to double the maximum terms of imprisonment for each category of felonies and for class A and class B misdemeanors.

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Two bills, safeguarding the right of tenants to associate and to work cooperatively toward the improvement of their living conditions free from undue interference by their landlord, have been recommended for approval by the Committee on Civil Rights, Maurice N. Nessen, Chairman. The bills, which amend sections of the Real Property and Executive laws, prohibit a landlord from interfering with the right of a tenant to participate in a group formed to protect the rights of tenants or to deny such group access to areas designed for the common use of all tenants. Similarly, it would be unlawful to refuse to lease or renew the lease of any person by reason of his participation in such protected activities.

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The Committee on State Legislation, Benjamin Levine, Chairman, has recommended approval of a bill to amend EPTL §7-1.5 so as to grant the creator of an income trust the option of freeing his beneficiary from the restraints on alienation mandated by the present spendthrift provisions.

In the much abused service of process area, the Committee has also supported attempts at legislative reform. It urges passage of a bill requiring process servers to keep detailed records of any service made. The bill provides that proof of service must include the time and address of service and a reasonably complete description of the person served.

Erratum

The Vesey Street Letter, April 1973, at 5, col. 2, incorrectly reported that the Committee on Real Property Law, Barnet Kaprow, Chairman, had recommended disapproval of a proposed bill which would bar a cooperative or condominium plan from becoming effective unless 51% of the existing tenants consent to purchase.

The Committee's adopted recommendation favors approval of the bill on the grounds that the present requirement of 35% is insufficient to insure that a minority of tenants will not impose a plan on the majority, and that the increased requirement will tend to prevent injustice and coercion, which have sometimes been the case.

LIBRARY

Effective May 1, 1973, the Library will again subscribe to CCH's State Tax Reporter looseleaf service for all States plus Puerto Rico, and the complete Prentice-Hall Federal Tax Library.

IMPORTANT NOTICE TO MEMBERS

Mr. Wilbur H. Friedman, Chairman, Committee on Group Insurance and Employees Pensions and Benefits, reports receipt of advice from Ter Bush & Powell, Inc. that Mutual of New York will again pay dividends under our Term Life Insurance Program:

Effective June 1, 1973 those members who are insured under our Program will receive benefit of the following dividends: Under age 35–37½%; ages 35-39–32½%; ages 40-44–22½%; ages 45-49–15%; ages 50 & over–10%. The current premium will be reduced by these percentages applied to premiums paid during the preceding 12-month period.

Those insured members who are under age 45 will be receiving an additional 2½% dividend as compared to last year.

COMING EVENTS

We wish to remind members of the Association to make reservations promptly for the 65th Anniversary Annual Meeting on May 17 at which a sumptuous supper will be served commencing at 6:30 P.M. at a cost of $5.00 per person. Guests of members are cordially invited to attend. In addition to the election of officers and directors, we will have the pleasure of listening to Dean Joseph M. McLaughlin of Fordham University School of Law.

On Wednesday, May 23, the last Luncheon Forum of the season will be held in the Auditorium at 12:30 P.M., sponsored by the Committee on the Federal Courts of which Helmut F. Furth is Chairman, with The Honorable Robert A. Morse, United States Attorney for the Eastern District of New York, as the speaker.

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