Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

November 12, 1954

United States

DEPARTMENT OF JUSTICE

Vol. 2 No. 23

UNITED STATES ATTORNEYS

BULLETIN

RESTRICTED TO USE OF

DEPARTMENT OF JUSTICE PERSONNEL

UNITED STATES ATTORNEYS BULLETIN

Vol. 2 November 12, 1954 No. 23

JOB WELL DONE

United States Attorney Robert E. Hauberg, Southern District of Mississippi, is in receipt of a letter from the Assistant Judge Advocate General of the Army, extending his congratulations to Mr. Hauberg for the very favorable result achieved in a recent case which presented a novel question of law.

The Special Agent in Charge, United States Secret Service Field Force, has written to United States Attorney Robert Tieken, Northern District of Illinois, expressing on behalf of the Secret Service appreciation to Mr. Tieken and Assistant United States Attorney Edward Callahan for bringing a recent case to a successful culmination. The Special Agent in Charge stated that it was a tribute to Mr. Tieken's office and to Mr. Callahan that the matter was successfully prosecuted after two previous trials had resulted in juries failing to agree and that this was a difficult barrier to overcome. Another letter from the Special Agent in Charge to Mr. Tieken expressed appreciation for the very prompt and very excellent manner in which a recent trial involving a charge of conspiracy to counterfeit was conducted by Assistant United States Attorney Chester E. Emanuelson, who brought the case to a successful conclusion.

United States Attorney Heard L. Floore, Northern District of Texas has received from the General Counsel of the Veterans Administration, a letter expressing appreciation of Mr. Floore's efforts as well as those of Assistant United States Attorney Fred L. Hartman and all other members of the staff who participated in any way in the preparation and trial of several recent cases. The General Counsel stated that the successful conclusion of such cases will have a deterrent effect on other individuals who might be tempted to indulge in similar practices.

United States Attorney C. M. Raemer, Eastern District of Illinois, is in receipt of a letter from a private firm which stated that the proceedings before a recent grand jury were very skillfully handled. It appears that Assistant United States Attorney Edward G. Maag during the period February 2, to June 30, 1954, presented before a grand jury investigating labor racketeering a total of 375 witnesses from all over the United States. In a subsequent two week period beginning September 20, 1954, an additional 50 witnesses were presented by Mr. Maag. The grand jury's investigation of labor racketeering resulted in 16 indictments, involving 13 defendants charged with violations of 18 U.S.C., 1951. In addition to the labor racketeering investigation, Mr. Maag and Assistant United States Attorney John Morton Jones presented before

the grand jury 109 witnesses in other matters which resulted in 32 indictments. An interesting aspect of this accomplishment is that despite the time and effort required by the prolonged grand jury investigation the United States Attorney's office was able to keep up on its current criminal docket.

Assistant Attorney General Dallas S. Townsend, Director of the Office of Alien Property, has received a letter from the firm of Bartlett, Poe & Claggett, of Baltimore, commending the efforts of Paul E. McGraw of the Office of Alien Property on the trial of an action in the District Court in Maryland against the firm's client, Atlantic Refining Co. The Office had intervened because Atlantic, a purchaser of ex-enemy property from the Attorney General, was sued by the former owner. The letter states that 'both my client and its lawyers believe that Mr. McGraw's thorough and persevering work should be brought to your attention.'

United States Attorney Fred Elledge, Jr., Middle District of Tennessee, has received a letter from Colonel G. M. Dorland, C. E., expressing appreciation of the efficiency and cooperation with which Mr. Elledge and Mr. Keith Bohanon, Special Assistant to the United States Attorney, represented the Government in litigation to condemn land for the Old Hickory and Cheatham Projects. Colonel Dorland regards the verdicts as indicative of the profound ability and careful preparation of Messrs. Elledge and Bohanon.

United States Attorney Robert Tieken, Northern District of Illinois, has received from a member of a law firm representing the plaintiff in a recent case against the Government, a letter stating that Assistant United States Attorney Donald S. Lowitz gave every evidence of exceptional ability as a lawyer, and was most courteous in his conduct of the trial. The letter further observed that if Mr. Lowitz is an example of the staff, Mr. Tieken is greatly to be complimented.

* * *

CRIMINAL DIVISION

Assistant Attorney General Warren Olney III

SELECTIVE SERVICE

Conscientious Objectors - Jehovah's Witnesses - Classification. As reported in the last issue of the Bulletin, Vol. 2, No. 22, dated October 29, 1954, the Supreme Court has granted certiorari in four cases (Witmer v. United States, 213 F. 2d 95 (C.A. 3); Gonzales v. United States, 212 F. 2d 71 (C.A. 6); Sicurella v. United States, 213 F. 2d 911 (C.A. 7); and Simmons v. United States, 213 F. 2d 901 (C.A. 7)) involving the classification of conscientious objectors, particularly with respect to Jehovah's Witnesses.

With regard to cases involving similar questions concerning conscientious objector classification now pending in any district court or court of appeals it is suggested that the court be requested to withhold action pending the outcome of the Supreme Court cases. It is further suggested that, pending action by the Supreme Court, prosecutions of this nature not be instituted in matters which would be governed by any of the aforementioned cases.

LABOR RACKETEERING

During the past two years an intensive investigative and prosecutive effort has been carried on in the field of labor racketeering. Indictments directed at labor racketeering activities have now been reported under 18 U.S.C. 1951, 29 U.S.C. 186, and other statutes, in the Eastern District of Missouri, District of Columbia, District of New Jersey, Southern, Eastern and Northern Districts of Illinois, Middle District of Georgia, District of Minnesota, and District of Puerto Rico. Convictions have been reported in the Eastern District of Missouri and the Southern District of Illinois. Some idea of the statutes and theories of prosecution utilized in combating labor racketeering can be obtained from a brief examination of the cases in the Eastern District of Missouri.

On October 18, 1954, the Supreme Court denied certiorari in Hulahan v. United States, 214 F. 2d 441 (C.A. 8). The Court of Appeals held that Congress has the power to deal with extortion or attempted extortion actually or potentially affecting interstate commerce just as it has the power to deal with unfair labor practices. The Court further held that extortion "from contractors engaged in local construction work who are dependent upon interstate commerce for materials, equipment and supplies" is proscribed by 18 U.S.C. 1951.

United States v. Callanan, et al, also from the Eastern District of Missouri, is now awaiting argument before the Court of Appeals for the Eighth Circuit. In arguing that bail was justified, defendant Callanan

claimed that the Government's theory of the prosecution was untenable. He stated that the case was prosecuted on the theory that extortion under 18 U.S.C. 1951 included the obtaining of property by the wrongful use of fear of economic injury and financial loss. He contended, therefore, that a substantial question was presented which justified the granting of bail. Notwithstanding this contention, bail was denied by the Court of Appeals and by Supreme Court Justices Clark and Black.

Staff: Both the Hulahan and Callanan cases were tried by Tom DeWolfe (Criminal Division) and Special Assistant United States Attorney Forrest W. Boecker (E.D. Mo.)

Other indictments returned in the Eastern District of Missouri charge labor representatives with the following: submitting false statements to the Secretary of Labor (29 U.S.C. 159(f)(g) and 18 U.S.C. 1001); obstruction of justice (18 U.S.C. 1503); violations of the Labor-Management Relations Act (29 U.S.C. 186(b)(d)); as well as violations of 18 U.S.C. 371 and 1951. In United States v. Coleman, the defendant, a union representative, pleaded guilty to charges under 29 U.S.C. 186(d) of receiving money from an employer of employees represented by him who were employed in an industry affecting commerce. Coleman was fined $1,000. This is the first case to be prosecuted under this section.

Staff: Assistant United States Attorney William K. Stanard II. (E.D. MO.)

FOOD AND DRUG

Responsibility of Corporate Officers - In United States v. Diamond State Poultry Co., Inc. (D. Del.) the defendant corporation and two of its principal officers were charged with shipping diseased poultry in violation of the Food, Drug and Cosmetic Act. The case was tried to the court and the defendants were found guilty in a written opinion dated October 1, 1954. The court's decision is significant in dealing with the question as to the responsibility of corporate officers with respect to violations of regulatory statutes by corporations. On this point, the opinion of the court states:

> Under the Food, Drug and Cosmetic Act, proof of personal participation of an individual defendant is not required to establish guilt if the individual is the responsible person for the operation of the business out of which the violation grows. United States v. Dotterweich, 320 U.S. 277, 280-81, 285-6; United States v. Greenbaum, (C.A. 3) 138 F. 2d 437; United States v. Parfait Powder Puff Co., Inc., (C.A. 7) 163 F. 2d 1008, cert. denied 332 U.S. 851.

MEAT INSPECTION ACT

Prosecution of Partnership - United States v. Pfister Meat Company, a partnership (E.D. Mo.). The defendant partnership was charged with violation of 21 U.S.C. 78 in unlawfully transporting from St. Louis, Missouri, to the State of Illinois, a quantity of meat of cattle which had not been inspected, examined and marked "Inspected and Passed". A motion to dismiss the information on the ground that a partnership entity was not a person, firm or corporation within the meaning of the provisions of said Section 78 was overruled by the court. Thereafter, the defendant changed its plea of not guilty to one of guilty and a fine of $500 was imposed, with execution stayed for thirty days.

Staff: Assistant United States Attorney Robert C. Tucker (E. D. Mo.).

CIVIL RIGHTS

Brutality by Police Officer - Illegal Summary Punishment. United States v. Joseph Michael Donahue (2 cases) (Kansas). On October 7, 1954, a grand jury at Topeka, Kansas, returned two indictments against Donahue, a Kansas City, Kansas, police officer, for having wilfully beaten and otherwise mistreated victim Anderson in May 1953 and victim Manion in August 1953, in unrelated incidents. In each case the defendant, allegedly without justification, assaulted and injured his victim while placing him under arrest in connection with a minor traffic violation. Each indictment, in one count, charges illegal summary punishment by the defendant while acting under color of law. These are believed to be the first indictments returned in Kansas under the civil rights statute for police brutality.

Staff: Assistant United States Attorney Milton P. Beach (Kansas).

Brutality by State Narcotics Inspector - Deprivation of Liberty Without Due Process of Law - Attempted Extortion of Confession or Information. United States v. Woodford Floyd Hendricks (W.D. Tex.). The Grand Jury at San Antonio returned an indictment under 18 U.S.C. 242 against defendant, who, while acting as a narcotics agent of Texas, brutally kicked a young suspect. The victim had first been forced to remove his outer garments and then to lie down on a gravel road. The kicks were administered by the defendant in an attempt to make the victim confess to or give information about a narcotics violation. The victim sustained fractured ribs as a result of the assault. No charges were ever filed against him.

Staff: Assistant United States Attorneys Bradford Miller and Harman Parrott (W.D. Texas).

* * *

CIVIL DIVISION

Assistant Attorney General Warren E. Burger

SUPREME COURT

SELECTIVE TRAINING AND SERVICE ACT OF 1940

Certiorari Granted in Veteran Reemployment Matter Involving Advancement under Escalator Principle. Paul W. Diehl, Jr. v. Lehigh Valley Railroad Co., 211 F. 2d 95 (C.A. 3). In this case suit was brought on behalf of a veteran by the United States Attorney at Philadelphia under the reemployment provisions of the Selective Training and Service Act of 1940, 50 U.S.C., App. 308. The veteran on return from military service was reemployed, completed the 1160 days experience necessary for promotion, and was promoted to the position of permanent car man mechanic. However, non-veterans who entered upon the same work Diehl had done before promotion, but at a later date than he, were able to complete their 1160 days experience before Diehl and were given seniority antedating his. He contended that having qualified for promotion by actual experience he was entitled to seniority in the position of permanent car man mechanic as of the date he would have been promoted but for his absence in the military service. The district court held that having been restored to his prewar job Diehl was given all that the statute entitled him to and, since he was treated as well as employees on furlough or leave of absence, he was barred by the "furlough or leave of absence" provision of the statute (50 U.S.C., App. 308(c)) from the advanced seniority claimed. This was affirmed on appeal in an opinion which in effect stated that Section 9 (c)(1) of the later Universal Military Training and Service Act (50 U.S.C., App. 459(c)(1)) was identical with Section 8(c) of the act under which Diehl claimed advanced seniority, that Section 9(c)(2) of the later act was a Congressional restatement of the escalator principle enunciated in Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275 and other decisions, and that Congress intended no change in the law. Notwithstanding this the court found an irreconcilable conflict between the provisions of the subsection enunciating the escalator principle and the furlough and leave of absence provisions of the two acts. Affirmance was based on the extraneous ground that the collective bargaining agreement did not on its face discriminate against veterans. Petition for certiorari was filed on behalf of Diehl by private counsel and certiorari has now been granted. The forthcoming decision should resolve the seeming conflict between such decisions as Morris v. Chesapeake & Ohio Ry., 171 F. 2d 576 (C.A. 7), certiorari denied, 336 U.S. 967; Conner v. Pennsylvania R.R., 177 F. 2d 854 (C.A. D.C.), certiorari denied, 339 U.S. 919; and Spearman v. Thompson, 167 F. 2d 626 (C.A. 8) on the one hand, and Gregory v. L. & N.R.R., 191 F. 2d 856 (C.A. 6), certiorari denied, 343 U.S. 903; Addision v. Tenn. Iron & R.R. Co., 204 F. 2d 340 (C.A. 5); Bostian v. Seabord Air Line R.R. Co., 211 F. 2d 867 (C.A. 4) and the instant case on the other.

STATUTES OF LIMITATION

Inapplicability of State Limitations to Suits on Claims of Government Corporations. United States v. Aaron Borin (No. 108, October Term, 1954, Oct. 14, 1954). The Supreme Court has denied defendant's petition for a writ of certiorari which sought review of a Fifth Circuit decision, holding a State statute of limitations inapplicable to a claim of the R.F.C., 209 F. 2d 145, U.S. Attorneys Bulletin, Vol. 2, No. 3, Feb. 5, 1954.

Staff: John J. Cound (Civil Division).

COURT OF APPEALS

EMERGENCY PRICE CONTROL ACT OF 1942

Recapture of Coffee Subsidy Payments. H. P. Coffee Company v. Reconstruction Finance Corporation, (No. 667, Emergency Court of Appeals, October 8, 1954). In aid of the price control program, Directive 87 of the Office of Economic Stabilization issued under Section 2 of the Emergency Price Control Act of 1942, authorized the payment of a subsidy based upon coffee purchased by importers during a specified period in 1945 and 1946. The subsidy was paid in accordance with a uniform contract between the paying agency, R.F.C., and the participating importers. H. P. Coffee Company filed its complaint from an adverse determination that, under an amendment to the Directive and a modification of the contract, it was obliged to restore $35,227.11, which was the subsidy equivalent of the coffee in the importer's inventory at the expiration of the subsidy program. The court sustained R.F.C.'s ruling holding: (a) that the amount of the refund due R.F.C. was properly based upon all the coffee in the Company's terminal inventory and was not limited to coffee upon which R.F.C. paid the subsidy; (b) that the recapture provision did not exclude therefrom coffee subsidies paid prior to the date of the modification; (c) that the Company is liable for interest, and a letter of R.F.C. stating that it would not insist upon repayment until a pending case was decided did not constitute a waiver of interest.

Staff: Maurice S. Meyer (Civil Division).

NATIONAL SERVICE LIFE INSURANCE

Lapse For Non-payment of Premiums - Termination of Allotment When Serviceman is AWOL - United States v. Rosa Griffin (C.A. 8, No. 15032, October 29, 1954). George Griffin, Jr., entered upon active duty in the Army in October 1950, and shortly thereafter applied for National Service Life Insurance, authorizing the Army to deduct the monthly premium of $7.20 from his service pay. On November 28, 1950 Griffin went AWOL and remained in that status until his death in March 1951. At the time that he absented himself, the Army credited him with $64.31 in accrued service pay but some months later terminated his insurance allotment, effective the end of November 1950. This termination

was required by Army Special Regulation 35-1900-5, 10 October, 1950, which provides that when a person is in a continuous non-pay status for ten days or more, his insurance allotment will be discontinued as of the last day of the most recent month during which sufficient pay accrues from which the deduction may be made.

This suit was brought by the beneficiary of Griffin's National Service Life Insurance policy. The Government defended, inter alia, on the ground that the insurance had lapsed for non-payment of premiums on January 1, 1951 since the insurance allotment had been terminated at the end of November 1950 and premiums had not been paid thereafter from any other source. The district court rejected this defense, holding that the regulation permitted allotment termination only in circumstances where there is no accrued active service pay from which to deduct the amount of the allotment. The court added that any other interpretation of the regulation would render it in conflict with Section 602(m)(1) of the National Service Life Insurance Act (38 U.S.C. 602(m)(1)) which permits the serviceman to elect to have thepremiums on his NSLI insurance deducted from his active service pay.

The Court of Appeals reversed. It held (1) that the regulation in terms required the termination of the allotment at the end of November 1950 since no service pay accrued to Griffin thereafter; (2) that while the question as to whether the regulation is consistent with Section 602(m)(1) "is not free from doubt," the regulation is not unreasonable, the practice of automatically terminating insurance allotments in circumstances where the serviceman has absented himself long has been followed, and this practice has received Congressional recognition; and (3) the allotment having been validly terminated, and premiums not having been paid from any other source, the insurance lapsed prior to the serviceman's death.

Staff: Alan S. Rosenthal (Civil Division).

BANKRUPTCY

Right to Appeal From Order of Bankruptcy Court - Offset of Debt Due Government Corporation With a Tax Refund Due Bankrupt - Equitable Subordination and Priority of Government Claims. Frank Luther, Trustee v. United States (No. 4929 - C.A. 10), Oct. 25, 1954. Both the United States, on behalf of the Commodity Credit Corporation, and the Trustee in bankruptcy appealed from an order of the referee in bankruptcy which partially allowed the Government's claim against the bankrupt Garden Grain & Seed Co., Inc., which operated a series of grain warehouses in the State of Kansas. The Trustee contended that the United States lost its right of appeal when a tax refund due the bankrupt was credited to the Commodity Credit Corporation in partial liquidation of CCC's claim against the bankrupt. On the strength of this contention the court ordered the Trustee's cross appeal heard

separate from and in advance of the Government's appeal from the same order. On the merits, the court determined that the United States had not, by the intra-governmental adjustment of accounts between the CCC and the Treasury, accepted a benefit of the referee's order so as to deprive it of its right of appeal.

The court also rejected the Trustee's contention that the debt due CCC was not a debt due the United States and could not be offset with a debt owed by the United States, and held that the fact that the tax refund was not determined to be due until after the adjudication of bankruptcy, did not affect the Government's right to offset one debt against the other.

In addition, the court held that the priority in order of payment accorded the United States by the Bankruptcy Act (11 U.S.C. 104(a)) and by 31 U.S.C. 191; which priority was expressly given to CCC by its Charter Act, (15 U.S.C. 714b(e)), precluded the bankruptcy court from subordinating the Government's claim to the claims of common creditors. The Trustee argued that CCC had, prior to bankruptcy, been guilty of inequitable conduct which enabled it to obtain an economic advantage over other creditors.

The Government's appeal from theorder of the bankruptcy court has been tentatively set for an en banc hearing at the January Term of Court.

Staff: John G. Laughlin (Civil Division).

FEDERAL TORT CLAIMS ACT - GOVERNMENT CONTRACTS

Contractual Stipulation as to Government Liability For Loss or Damage to Rented Aircraft - Effect of Provision in Suit Under Federal Tort Claims Act. Davies Flying Service v. United States (No. 12090 - C.A. 6, October 28, 1954). By contract the Davies Flying Service agreed to furnish authorized personnel of the Civil Aeronautics Administration with a certain type aircraft for use in the performance of CAA activities. The contract provided that: "The contractor shall assume full responsibility for loss of or damage to the rented aircraft, and agrees to save the Government harmless from liability for damage to the property of and injury to or death of third persons, except that due to negligence on the part of Government personnel in line of duty." An aircraft delivered under the contract and piloted by an employee of the CAA crashed and was destroyed. The contractor sued under the F.T.C.A. for the value of the plane, alleging that the crash and destruction were proximately caused by the negligence of the Government pilot. The district court held for the United States. On appeal, appellant

contended that under the bailment law of Kentucky, where the accident occurred, upon proof of delivery of the aircraft and the failure of the United States to return the aircraft, there was a presumption of negligence on the part of Government personnel by reason whereof the burden devolved upon the United States to affirmatively prove its freedom from negligence. The Court of Appeals affirmed, per curiam. Concluding that the contractual stipulation with respect to liability for loss or damage to the aircraft was ambiguous, and noting that it was open to the interpretation that the contractor was liable for loss of or damage to the aircraft whether due to negligence of the United States or not, the court construed the contract most favorably to appellant and held that it placed the burden of affirmatively proving negligence upon appellant unaided by any presumption of negligence. This feature of the contract distinguished the case from the ordinary bailment cases and the court held that the district court was correct in finding that appellant had failed to prove the negligence of the Government pilot.

Staff: John G. Laughlin (Civil Division).

DISTRICT COURT

GOVERNMENT EMPLOYEES

Applicability of Government Employees Security Program to All Government Agencies and All Employees. Cole v. Young, et al. (D.C. D.C.). This is the first case ruling on the validity of the Government employees security program. Plaintiff, a food and drug inspector in the Department of Health, Education and Welfare, was separated on the ground of association with Communists. He brought suit for restoration on the ground that the security program could not be extended to "non-sensitive" employees "in non-sensitive agencies." The district court dismissed the complaint on the ground that the Act of August 26, 1950 (5 U.S.C. 22-1), authorizing the dismissal of employees in the absolute discretion of the agency head when deemed necessary in the interests of national security, authorized the President to extend the provisions of that Act to all agencies of the Government, which he did by Executive Order 10450 (18 F.R. 2489). The district court held that the security program is applicable to employees discharged on grounds of disloyalty as well as employees who are loyal but are deemed security risks.

Staff: Donald B. MacGuineas, Andrew P. Vance (Civil Division).

SOCIAL SECURITY ACT

Allegation of Denial of Fair and Impartial Trial - Finality of Administrative Hearing. Otto A. Pahl v. Oveta Culp Hobby (E.D. Wash., N.D.). Plaintiff filed suit to obtain judicial review of a decision

denying him entitlement to old-age insurance benefits because of lack of quarters of coverage under the Social Security Act. Pahl in a somewhat novel theory, contended that he had self-employed income from gambling activities. The case was treated as one for judicial review under section 205(g) of the Social Security Act (42 U.S.C. 405(g)), and, in accordance with the usual procedure in such cases, a motion for summary judgment was filed on the grounds that the findings of fact were conclusive since based on substantial evidence. The motion was denied, and a trial was held as to the plaintiff's allegations that he was denied a fair and impartial trial. District Judge William J. Lindberg determined that, even assuming that he had been denied right to counsel at the hearing, contrary to law, the proof adduced by plaintiff was not sufficient to establish that his business was gambling rather than mere participation in friendly games of draw poker. After ruling on plaintiff's offer of proof, the court held that under section 205(g) of the Social Security Act the findings were supported by substantial evidence and, accordingly, judgment was rendered against plaintiff.

Staff: Assistant United States Attorney William M. Tugman (E.D. Wash.); Joseph Langbart (Civil Division).

FINES

Collection By Court Order - (E.D. N.Y.). The United States Attorney for the Eastern District of New York has reported a procedure which he followed in an effort to collect a $10,000 fine judgment which has been unpaid for the past 9 years. He filed a motion to compel the defendant to make installment payments pursuant to Section 793 of the New York Civil Practice Act and obtained an order directing the debtor to pay $250.00 or more each month until the indebtedness was satisfied. Defendant failed to make his first payment, whereupon an order was served upon him to show cause why he should not be adjudged in contempt. No decision was made in this connection, as the defendant made the payment as required by the original order. The procedure followed by the United States Attorney appears to be unique, and it is believed that the same procedure may be followed in other districts by resort to state procedures providing for supplementary proceedings after judgment.

Staff: Assistant United States Attorneys Agnes B. Stallings and Margaret E. Millus, (E.D. N.Y.)

VETERANS AFFAIRS

Escheat of Veteran's Real Property to The United States - In Re. Cristino Rodriguez Agosto, (Superior Tribunal of San Juan, Puerto Rico (Estate of Jose Candelario, deceased)). Jose Candelario Padilla, an incompetent veteran, died intestate on February 20, 1953 without heirs. The United States and the Commonwealth of Puerto Rico

laid claim to the residue of the estate of the deceased consisting of a house and lot located in San Juan, Puerto Rico. The claim of the United States was based upon 38 U.S.C. 450(3) providing that funds derived from certain veterans benefits which, under the law of the state wherein the beneficiary had last legal residence, would escheat to the state, shall escheat to the United States. The Commonwealth of Puerto Rico took the position that the federal statute referred only to funds in the hands of a guardian or administrator and did not include real property. The Puerto Rico court held that the federal statute was not thus limited and that the words thereof include real property.

Staff: United States Attorney Ruben Rodriguez Antongiorgi, Assistant United States Attorney Luis Domingo Miranda, (D. Puerto Rico).

LABOR MANAGEMENT RELATIONS ACT

United States of America v. Union Carbide and Carbon Corporation, United Gas, Coke and Chemical Workers, CIO, et al. (D.C. E.D. Tenn.). On October 30, the statutory period for the national emergency injunction entered in the Oak Ridge and Paducah strike expired. Pursuant to Section 210 of the Labor Management Relations Act and following the receipt of the certification of the ballot conducted by the National Labor Relations Board, the Attorney General moved to vacate the injunction. The Court entered an appropriate order in compliance with the motion. It is our understanding that the workers at both Oak Ridge and Paducah have refrained from going out on strike pending further negotiations looking toward a settlement of the controversy.

Staff: Assistant Attorney General Warren E. Burger, Edward H. Hickey and John G. Roberts (Civil Division); United States Attorney John C. Crawford, Jr. (E.D. Tenn.)

RENT STABILIZATION

Writ of Execution Issued in Name of United States on Behalf of Tenants. United States v. Hackett, et al., 123 F. Supp. 104 (W.D. Mo., July 22, 1954). On the basis of a judgment in favor of the United States, "for and on behalf of" three named tenants, aggregating $287.50, the three tenants caused an execution to be issued in the name of the United States on their behalf for the $287.50, and garnishments to be served by the Marshal upon various tenants of defendants, attaching and impounding rents owing to the defendants. Defendants filed a motion to quash the execution upon the grounds "that the judgment was in the name of the U.S.," "That the real party in interest is the U.S., not the (three named tenants)", and that, therefore, only the United States can prosecute the execution. The court, quoting

Rule 71 (Title 28, U.S.C.A.) and observing that the order and decision upon which the challenged execution rests expressly stated that it was rendered "for and on behalf of" the three judgment creditors who have caused to be issued and who now prosecute this execution, held that defendants' attack was not good and denied their motion to quash. This decision is in accord with the Civil Division letter of November 2, 1953 sent to all United States Attorneys. Re: Supplemental Instructions for Office of Rent Stabilization Litigation (Paragraph 2c).

Staff: United States Attorney Edward L. Scheufler (W.D. Mo.)

* * *

ANTITRUST DIVISION

Assistant Attorney General Stanley N. Barnes

JUDICIAL REVIEW OF ADMINISTRATIVE ORDER

State of North Carolina, et al. v. United States, et al., (Civil Action No. 302-R, M.D. N.C.) This was an action to set aside, annul and suspend an order of the Interstate Commerce Commission permitting the Norfolk Southern Railway Company to abandon a portion of one of its branch lines. Plaintiffs contended that there was no substantial evidence before the Commission to justify or support the findings of the Commission and the conclusions based thereon. They also contended that it would not be in the public interest to abandon such line and that the certificate authorizing such abandonment constituted an arbitrary and capricious act and a gross abuse of administrative discretion. Plaintiffs further contended that such certificates and orders permitting abandonment constituted an unsupported conclusion of law which would deprive certain of them of their property without due process of law and without just compensation. Defendants based their defense on the well-settled principles in abandonment cases which have appeared in Supreme Court reports for many years and also showed that the evidence was sufficient to sustain the Commission's report and order.

The three-judge court found that the findings made by the Interstate Commerce Commission were adequate and were supported by substantial evidence and weighed the prospective loss to the public and shippers in the manner set forth in the long line of Supreme Court cases. On September 29, 1954, the court dismissed the complaint filed by the plaintiff and refused to set aside the order of the Commission.

Staff: Willard R. Memler (Antitrust Division)

MONOPOLY

In the Matter of the Statement of Trans-Pacific Freight Conference of Japan Filed Under General Order 76, Docket No. 743. Following the issuance of a final injunction against the use of a contract-non-contract exclusive patronage rate system initiated by two conferences, or groups of steamship companies, by the United States District Court for the Southern District of New York, on March 21, 1951, in Isbrandtsen Co., Inc. v. United States, et al, 96 F. Supp. 883, on the grounds that the ultimate finding by the Federal Maritime Board, that the system was not unjustly discriminatory or unfair as between shippers, could not be sustained in view of the Board's primary finding that the amount of the spread between the two rates had been arbitrarily determined by the conference, the Board promulgated its General Order 76, providing for the filing of statements of intention to initiate such systems, with supporting data and provisions for public hearings.1/

1/ The contract-non-contract rate system is one in which competing water carriers come together in a conference and by concert of action fix rates in such fashion that if a shipper will agree to ship all of his goods over the lines of the conferees he will get a low rate; whereas if he will not so agree he will get a higher rate.

In compliance with the provisions of General Order 76, the Trans-Pacific Freight Conference of Japan, on September 10, 1953, filed its statement of intention to institute such a system in the trade between Japan and other named ports in the Pacific and Pacific Coast ports of the United States. Following the filing of protests and comments by Isbrandtsen Co., Inc., and the Departments of Justice and Agriculture, the Board ordered a full hearing in the case and entitled the proceeding In the Matter of the Statement of Trans-Pacific Freight Conference of Japan Filed Under General Order 76, Docket No. 743.

Hearings were conducted before an Examiner of the Board from January 4, 1954, to March 3, 1954, during which numerous carrier, shipper and expert witnesses were heard, compiling a record of testimony in excess of 5,000 pages, and through whom, more than 150 exhibits were received. Subsequent to the hearings, briefs and answers were filed by all parties, and thereafter on October 11, 1954, the Examiner issued a recommended decision consisting of sixty-five findings of fact in support of his conclusions, inter alia, (a) that the competition of the independent in the trade has had the beneficial effect of keeping conference rates at reasonable levels (b) that the conference has enjoyed a virtual monopoly of the post-war trade without the use of the proposed system (c) that use of the system would give the conference a complete monopoly and eliminate the independent from the trade and (d) that the reasons given for the use of the proposed system were not sufficient to justify its use. The ultimate recommendation to the Board was that the application for approval of the system should be denied.

It is anticipated that the Board will, in the near future, set a date for oral arguments by all parties, following which, it will issue a formal order, presumably in accord with the recommended decision.

Staff: Frank J. Oberg, (Antitrust Division).

MORTGAGE INSURANCE TIE-INS

On October 25, 1954, in an address delivered before the Annual Convention of the National Association of Mutual Insurance Agents, Judge Barnes stated departmental policy with respect to mortgage insurance tie-ins. He said, "Because of their inherently anti-competitive nature, insurance tie-in contracts falling within the purview of the Sherman Act are in our view prima facie unreasonable restraints of trade. That is to say, they are illegal unless they can be shown to be reasonable under the peculiar and particular facts in each individual case."

Judge Barnes pointed out that following the entry on June 30, 1954, of the consent judgment in United States v. Investors Diversified Services, Inc. (Civ. No. 3713, D. Minn.), which enjoined IDS from requiring its borrowers to place hazard insurance covering the mortgaged property through IDS, the Antitrust Division had received a veritable tide of complaints about similar tie-in practices followed by other mortgage lenders. In this connection, he said, "The IDS judgment should serve to warn each

lender who makes such a 'tie-in' contract, whether written or oral, expressly or informally, that he is following a course of extremely dubious legality, and should be prepared to justify it in court - if he can."

During the address, Judge Barnes announced that the Antitrust Division had set up procedures enabling it to consult other interested government agencies to determine whether administrative measures can and should be taken with respect to mortgage tie-in practices. In addition, he said that the Department planned to prosecute lenders who by tie-in practices persist in unreasonably debarring borrowers from access to the competitive insurance market.

* * *

TAX DIVISION

Assistant Attorney General H. Brian Holland

District Court and Court of Claims Decisions

TAX LIENS

Priority of Judgment Creditor without Lien over the Lien of the United States. James E. Kennedy, Receiver v. Puritan Church - the Church of America, et al. (D. D.C.). This action was brought by James E. Kennedy, a receiver appointed under a judgment of the Circuit Court of Cook County, Illinois, against Puritan Church - The Church of America. It appears that this church was a one-man organization and was used by its promoter to obtain contributions for the erection of a church in Washington, D. C.

Large sums of money were collected by the promoter but no church was ever built, although a piece of land was purchased in the name of the church by the promoter. Assessments for income taxes against the promoter, based upon the contributions received by him, were made and a transferee assessment based on these assessments made against the church.

The Director of Internal Revenue distrained upon the piece of realty in the District of Columbia and advertised it for sale. The receiver brought this action to restrain the sale alleging that the judgment under which he was appointed, being prior in time, gave him priority under Section 3672 of the Internal Revenue Code which provides that mortgagees, pledgees, purchasers and judgment creditors have priority over Government tax liens, unless the Government's lien is filed prior to the entry of judgment. The Government's liens in this case were filed subsequent to the recovery of the judgment in the Illinois court, but no judgment was ever procured in the District of Columbia.

A motion for a preliminary injunction came on to be heard on October 20, 1954, the day before the sale was scheduled to be held and Judge Holtzoff denied the preliminary injunction and ordered the sale to proceed, holding that the statute means a judgment creditor with lien, as was held by the Court of Appeals for the Ninth Circuit in Miller v. Bank of America, N.T. & S.A., 166 F. 2d 415.

Staff: Frederic G. Rita (Tax Division).

DISTRAINT FOR FEDERAL TAXES

Motions to Quash as Commencement of Civil Action. A number of actions to quash warrants for distraint have been commenced in violation of the requirements of Rules 3 and 4, Federal Rules of Civil Procedure, which require that civil actions be commenced by the filing of a complaint and the issuance of a summons. In the recent case of In re Market Basket, Inc., 122 F. Supp. 321 (W.D. Mo.), the District Court condemned this practice and held that the court was without jurisdiction of a proceeding thus commenced.

It is recommended that any such procedure be immediately objected to by motion to dismiss for lack of jurisdiction. If objection is not thus made in limine, the courts may hold that the objection is waived and that there is a submission to the jurisdiction as the Fifth Circuit held in Clark v. Powell, 104 F. 2d 438.

The objection to this practice is more than technical because, in most cases, officers of the Government are haled into court upon very short notice and thus deprived of the sixty days to answer afforded them by Rule 12(a), Federal Rules of Civil Procedure.

Staff: Frederic G. Rita (Tax Division).

EXCESS PROFITS TAXES

Computation of Base Period Net Income Where Base Period Income is Reduced by Repayments under Vinson Act. The Midvale Co. v. United States (C. Cls.). The United States Court of Claims granted the Government's motion for judgment on the pleadings in the above case on October 5, 1954. The issue was a novel one. Plaintiff contended that, for purposes of computing the excess profits credit of an accrual basis taxpayer using the average base period income credit method, the total of contract payments made by the Navy Department to taxpayer should be included in income in the base period years. The court held that only the net amount of payments, after deducting subsequent repayments (made in years subsequent to the base period years) of profits in excess of the 10% limitation of the Vinson Act should be included.

Staff: Edmund C. Grainger, Jr. (Tax Division)

JURY TRIAL

Application of Public Law 559 to Cases Pending on Date of Enactment. Margaretta Parr Campbell Hockenberger, Extrx. of Estate of Margaretta P. Campbell v. United States (W.D. Pa.). The District Court held on October 7, 1954, in the above case, that Public Law 559, 83rd Congress, approved July 30, 1954, amending Section 2402, Title 28, U.S.C.,

to permit jury trials in tax refund suits against the United States, applied retroactively to such actions instituted prior to the amendment.

The answer to this question was not clear to the Department. It was felt that in the absence of anything to show that the statute was intended to have retroactive effect, the Department should resist the demand for a jury trial in this case. Similar requests for jury trials in pending cases no doubt will be made. Consideration is being given as to what the Department's position should be in such cases and as to whether appeals should be taken from adverse decisions until such time as the law becomes settled. The possiblity of an amendment to the statute to clarify the matter is also under consideration. United States Attorneys will be kept advised as to the decisions reached on this problem.

Staff: Assistant United States Attorney D. Malcolm Anderson (W.D. Pa.), Mr. Fred J. Neuland, (Tax Division).

CRIMINAL TAX MATTERS

Suspension of Statute of Limitations on Criminal Tax Prosecutions -- New Provisions of 1954 Internal Revenue Code. Section 3748(a) of the 1939 Code suspended the running of the statute of limitations on criminal tax prosecutions during the time when an offender was absent from the judicial district. The 1954 Code, Section 6531, changes this language and now provides for suspension of the statute only during the time any person committing any of the offenses arising under the Internal Revenue Code of 1954 is outside the United States or is a fugitive from justice. This new provision is expressly made an amendment to the 1939 Code, Section 3748(a), if under that provision the period of limitations had more than three years to run on August 16, 1954, the date of enactment of the 1954 Code. In such event, the period of limitations is to be recomputed from the date of the offense with only periods of fugitivity and absence from the United States eliminated from the computation. When so recomputed, the period of limitations cannot expire less than three years after August 16, 1954. If, under the former provision, the period of limitations had less than three years to run on August 16, 1954, the new law does not apply.

The final sentence of Section 6531 of the 1954 Code states that the rules of Section 6513 of that Code shall be applicable for purposes of determining the periods of limitations on criminal prosecutions. Section 6513 provides, in general, that a return filed or a tax paid in advance of the date prescribed for filing or payment shall be deemed to have been filed or paid on such prescribed date. Until these provisions have been authoritatively construed in the courts, caution should be exercised in computing the period of limitations with respect to offenses committed after August 16, 1954. It would appear that when

the event constituting an offense is the filing of a return, or the payment of a tax, the last day prescribed by law or regulation for the filing of the return or the payment of the tax, may be deemed to be the time from which the statute of limitations will run. To avoid unnecessary litigation on the question, however, when returns or payments are made in advance of the last day prescribed for filing or paying, prosecutions involving such acts should be undertaken, when possible, within the period of limitations measured from the day on which the return was actually filed or the payment actually made. When the filing or payment occurs after the last day prescribed for the payment of the tax by reason of an extension granted or by reason of an election to pay the tax in installments, prosecution should be instituted, when possible, within the period measured from the last day prescribed for the payment or filing.

Tolling of Statute of Limitations by Filing of Complaint With Commissioner -- Necessity of Making Complaint and Proceedings Before Commissioner a Part of the Trial Record. If the statute of limitations is about to expire, a complaint may be filed with the United States Commissioner as provided in Section 6531, 1954 Code. This action tolls the statute of limitations for a period of nine months from the date of filing, not until the close of the next session of the grand jury as provided in the old law. This new provision is effective on and after August 16, 1954 with respect to offenses committed before that date as well as thereafter.

In the case of White v. United States, 545 CCH Par. 9575, decided September 3, 1954, one major question concerned the filing of a complaint by the Government so as to toll the running of the statute. The Fifth Circuit reversed the case for a new trial and on Petition for Rehearing appellant argued that the court erred in construing Rule 5(c), Federal Rules of Criminal Procedure, to permit the District Court (E.D. La.) to take judicial notice of the proceedings before the Commissioner, it being a fact that the record in the case did not show that the complaint before the Commissioner had been transmitted and filed in the Office of the Clerk of the District Court. Appellant then urged that since the only evidence before the jury went to show that the statute had run, the Court should grant a rehearing and sustain the motions for judgment of acquittal made by the defendant at the trial instead of merely ordering a new trial. Although the Court denied the rehearing, it said the tolling of the statute of limitations may depend on questions of fact to be determined on another trial. The decision of the court rendered October 29, 1954, on the Petition for Rehearing is not yet reported.

This case constitutes a warning that every effort should be made to make the complaint and the proceedings before the United States Commissioner a part of the record. The Circuit Court held on the

original appeal that the District Court was permitted "to take judicial notice of the proceedings before the Commissioner on preliminary examination which have been transmitted to the Clerk of the District Court."* However, on the Petition for Rehearing the Court said:

> If in fact the papers had not been so transmitted at the time of trial, then they had not become in any sense a part of the record upon which the District Court could rely in ruling as a matter of law that the prosecution was not barred by the statute of limitations.
>
> Under the situation, to toll the statute of limitations it was necessary for the Government to prove by evidence properly introduced before the jury that a complaint was instituted before a Commissioner of the United States in this the limitation period and that the time when the present information was instituted was before the discharge of the grand jury at its next session within the district, 26 U.S.C.A. 3748. The defendant of course, had a right, if he could, to controvert any such evidence and to prove contrary facts.

---

* Proceedings before the Commissioner were not in the record of the case at the time of trial, were not in the Office of the Clerk of the District Court, and had not been filed in the Clerk's Office at time of trial.

Staff (in White case): Assistant United States Attorney M. Hepburn Many (E.D. La.)

* * *

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

LEAVE AND PAY PERIODS

A question has arisen concerning the difference between leave periods and pay periods. A pay period begins on Sunday and ends on the second Saturday following.

The leave year starts at the beginning of the first complete pay period in the calendar year and runs until the beginning of the first complete pay period in the following year.

The first pay period in a year (for purposes of recording earnings and reporting compensation and taxes) covers the two-week period for which the first salary payment in a calendar year is made.

For instance, in 1954, the leave year began on January 3, 1954, whereas the first pay period covered the previous two-week period from December 20, 1953, through January 2, 1954, since salaries were not paid until after January 2, 1954.

The last work day for 1954 will be December 31, 1954. The pay period from December 19 through January 1, 1955, will be paid January 3 or later. January 2, 1955, will mark the beginning of leave period No. 1, and the beginning of pay period No. 2.

Persons keeping leave records and preparing payrolls should be familiar with these distinctions.

* * *

FINANCIAL REPORTS

Financial reports coming in from the field continue to show failure to report all obligations for the period covered by the reports. For example, telephone service frequently is not included until the bills are received. The same is true of the cost of transcripts on order but not delivered or billed. Travel expenses may be overlooked until the voucher is submitted. Government Transportation Requests should accompany vouchers.

There is also an appreciable lag in the payment of outstanding bills. United States Attorneys' offices are requested to pay particular attention to these two financial problems. Review of items in the United States Attorneys Bulletins may be helpful. Reference is made to the issues of September 4, 1953, page 14; January 8, 1954, pages 8 and 9; March 19, page 19; August 20, page 16 and September 17, page 21.

* * *

OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

RECIPROCITY

Attorney General's Vesting of Interests of Rumanian Enemy Heirs in Montana Decedent's Estate Entitled Attorney General to Appear for Heirs and Establish the Existence of Reciprocal Inheritance Rights between Rumania and the United States. In re Estate of William Gaspar, deceased (Supreme Court, Montana). On October 21, 1954, the Supreme Court of Montana affirmed a judgment decreeing distribution to the Attorney General, as successor to the Alien Property Custodian, of a two-thirds interest in the above estate, valued at over $100,000.

Decedent died intestate in 1940, a resident of Montana, leaving two brothers and a sister as his heirs. One of the brothers was a resident of Montana. The sister and the other brother were residents and citizens of Rumania. In 1942, the Alien Property Custodian, acting under authority of the Trading with the Enemy Act, vested the interests of the Rumanian brother and sister in the estate, upon finding that they were "enemies". In 1946, by Executive Order, the authority and property vested in the Custodian were transferred to the Attorney General.

The Montana brother claimed that he was entitled to the entire estate, contending that the Rumanian brother and sister were not qualified to inherit on the ground that they could not meet the requirements of a Montana statute which provided that, as a condition of inheriting, a non-resident alien must show that the country of his residence reciprocally permits Americans to inherit. The State of Montana agreed that the Rumanian brother and sister could not satisfy the reciprocal inheritance requirements but claimed that as a matter of Montana law the State was entitled to their shares by escheat. The Attorney General, on the other hand, contended that reciprocal inheritance rights existed between the United States and Rumania, thus entitling the Rumanian brother and sister to inherit, and that by virtue of his vesting order he succeeded to their shares.

After a lengthy trial featuring the testimony of Rumanian lawyers, the District Court upheld the Attorney General's contentions. The Supreme Court of Montana affirmed, holding (1) that as a consequence of the vesting order, all the rights of the Rumanian brother and sister in the estate passed to the Attorney General, including the right to appear and establish the existence of reciprocal inheritance rights; and (2) that the evidence amply supported the trial court's finding that on the date of the decedent's death, reciprocal inheritance rights existed between Rumania and the United States. The Supreme Court also refused to apply a 1951 amendment to the

statute, which substantially enlarged the proof required to show reciprocity, on the ground that the rights of the heirs vested on the date of the decedent's death in 1940 and that to apply the 1951 amendment retroactively would violate the state constitutional prohibition against the deprivation of property without due process of law.

Staff: United States Attorney Krest Cyr for the State of Montana; Valentine C. Hammack

James D. Hill, George B. Searls, Irwin A. Seibel (Office of Alien Property).

Reciprocal Rights of Inheritance Held to Exist between Germany and Montana - Attorney General Entitled to Seize Shares of German Nationals in Decedent's Estate under the Trading with the Enemy Act. In re Estate of R. E. Werth, deceased (District Court, Flathead County, Montana). On October 28, 1954, the District Court for Flathead County, Montana, ordered distribution to the Attorney General of eleven-twelfths of the estate of R. E. Werth, representing the shares of German nieces and nephews of the decedent, which had been vested under the Trading with the Enemy Act. The Attorney General's right to take the shares of the German enemies was contested by the State of Montana, which contended that the enemy shares should escheat to the state. The net estate amounts to about $12,000.

After trial the Court held (1) that reciprocal rights of inheritance existed between Germany and the State of Montana and between Poland and the State of Montana in June 1939, at the time of decedent's death, as required by Sec. 91-520, R.C.M. 1947; (2) that a 1951 amendment to Sec. 91-520 which enlarged the proof necessary to show reciprocity could not be applied retroactively; and (3) that identity of the German heirs was satisfactorily proved by the Attorney General as required by Secs. 91-3801 et seq. R.C.M. 1947, as amended in 1951.

This decision terminates more than five years of litigation in the District Court in this test case on the issue of existence of reciprocal inheritance rights between Germany and the State of Montana.

Staff: United States Attorney Krest Cyr for the State of Montana; Valentine C. Hammack

Lillian Scott (Office of Alien Property).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Admissibility of Evidence--Savings Clause--Burden of Proof--Constitutionality. Circella v. Sahli (C.A. 7). This was an appeal from a decision of the lower court denying a petition for habeas corpus on behalf of an alien who had been ordered deported from the United States.

One of the contentions advanced was that certain evidence had been improperly admitted in evidence in the administrative proceedings. This evidence consisted of the official alien registration record filed and sworn to by relator, his sworn application for a certificate of identification, his signed petition for naturalization, a sworn statement made by him in the naturalization proceedings, and a further affidavit made by him in those proceedings. It was urged that these records were inadmissible because relator was not warned at the time the documents were sworn to by him that they might later be used against him in deportation proceedings. The court held that these documents were admissible under the applicable regulations and that there was nothing therein that would affect the admission of documents made and sworn to by the deportee years before any investigation as to his deportability.

In other rulings, the court held that the deportation charge, based upon the Immigration Act of 1917, was valid in view of the savings clause in the Immigration and Nationality Act; that there was sufficient evidence on behalf of the Government to sustain its burden of proof of alienage; that Congress did not intend that aliens who had committed crimes when they were minor should be treated differently as to deportation than adult aliens who had committed such crimes; that delay by immigration authorities in instituting deportation proceedings did not justify application of the equitable ground of estoppel; that the Immigration and Nationality Act is not unconstitutional because the phrase "involving moral turpitude" used to describe the type of crimes the commission of which is to make an alien subject to deportation is so indefinite as to make the law "void for vagueness;" that the administration of the Immigration and Nationality Act by the Immigration and Naturalization Service is not an unconstitutional delegation of power; that the immigration statutes are not ex post facto in nature, and that certain retroactive provisions of the 1952 Act dealing with court recommendations against deportation do not deny aliens due process of law.

Failure to Furnish Address Reports--Statutory Interpretation--Scope of Review. Czapkowski v. Zimmerman (E.D. Pa.). This alien was ordered deported under the Immigration and Nationality Act on the ground that she had failed to furnish notification of her address to the Attorney General as required by that Act and that she had not established to the

satisfaction of the Attorney General that such failure was reasonably excusable or was not wilful. She brought habeas corpus to review the deportation order contending, as she did in the deportation proceedings, that her failure to notify the Attorney General of her current address and other required information was reasonable excusable. During the course of the deportation proceedings the alien had absconded, and her whereabouts from August 23, 1952, to April 13, 1953, were not known to immigration authorities. She subsequently admitted in the deportation proceedings that she was aware that she was required to report her current address during January, 1953, and gave as her reasons for failing to do so her fear of being taken into custody and being deported on a charge of which she was innocent, and her desire to prevent others whom she was afraid might deprive her of her liberty from knowing her address.

The court pointed to the provision for deportation for failure to file the required address report unless the alien establishes that such failure was "reasonably excusable or was not wilful." The court held that the quoted language was meant to be in the disjunctive and therefore that in a case in which the alien wilfully fails to furnish the address report, the Attorney General may stay deportation if he is satisfied that the failure was reasonably excusable. The court said that the scope of inquiry in a habeas corpus proceeding of this kind is limited to the enforcement of due process requirements, and that all the alien may complain about is that she was denied a fair hearing, that there was no evidence to support the Board of Immigration Appeals' findings, or that the Board, in reaching its decision, denied her a legal right. The alien here made no such allegations. Instead she wished the court to review the testimony in the administrative proceedings for the purpose of making its own findings and conclusions. In substance, she said that the Board's decision was arbitrary and capricious on the question of whether her failure to supply required information was reasonable excusable. The court refused to hold that the Board's conclusion was arbitrary or capricious and pointed out that the function of making findings on the merits is upon the Attorney General, acting through the Board, and that the court is not permitted to proceed de novo to make findings and conclusions on the matter.

Administrative Subpoena--Exhaustion of Administrative Remedies--Damages. Seder v. Leone (W.D. Pa.). Plaintiff brought mandamus action against defendant, a Special Inquiry Officer of the Immigration and Naturalization Service, to compel the latter to issue an administrative subpoena to compel attendance of witnesses and production of records. Defendant's refusal to issue such subpoena was alleged to amount to denial of due process and fair hearing. After argument, the court permitted plaintiff to amend the complaint. The amendments, among other things, sought an injunction and damages in the amount of $10,000 from the defendant, who moved to dismiss the amendments as well as the original complaint.

The court observed that no determination of deportability had yet been made and that if such were made it could be appealed to the Board of Immigration Appeals. The contention that the court should interfere either by mandamus or injunction in the initial stages of an administrative proceeding was held to be at war with the long-settled rule that ordinarily no one is entitled to judicial relief until administrative remedies have been exhausted. Circumstances justifying departure from that rule were not here present.

Plaintiff contended that the court should intercede at the present stage of the proceedings because the remedy of appeal after the exhaustion of administrative remedies is inadequate. The court was thus faced with the proposition that it should decide the propriety of the defendant's refusal to issue the subpoena at this time because it might be unnecessary to pass upon that question after the exhaustion of administrative remedies. This was held unacceptable since it amounts to a contention that the scope of judicial interference with administrative process should be broader before rather than after the completion and exhaustion of such process. The fact that a judicial determination upon the constitutional and other questions raised might not be necessary after the exhaustion of administrative process is a reason for, rather than against, refusing to decide such questions now. Further, while it was not clear whether the claim for damages was intended to be against defendant personally or in his official capacity, no theory was suggested, and the court was aware of none, by which the pleadings could be construed to state a claim for which damages could be granted and no facts were alleged from which the jurisdiction of the court over any such action for damages could be inferred. The motion to dismiss was granted.

EXCLUSION

Administrative Subpoena--Scope of Authority. Matter of Louie Wing (N.D. Calif.). This was a motion for an order to compel Louie Wing to testify before the immigration authorities in exclusion proceedings against his alleged father, Louie Fook Thin. An administrative subpoena directing Louie Wing to appear had been issued under a statute which authorized such subpoenas to compel the attendance and testimony of witnesses "touching the right of any alien to enter, reenter, reside in, or pass through the United States."

Louie Fook Thin had previously been admitted to the United States on several occasions by the immigration authorities as a citizen. Counsel for Louie Wing contended that these prior declarations that Thin is a citizen is prima facie evidence of that fact until rebutted and that he cannot therefore be deemed to be an "alien" within the quoted language and the subpoena therefore is void.

The court held that although the subpoena power was limited by the language of the statute, it would be absurd to hold that the immigration authorities must establish alienage as a fact before they can compel

the production of evidence necessary to determine whether alienage does or does not exist. Neither must alienage be proved to the court before the court can or should aid the immigration authorities in their search for the facts. Immigration authorities have the initial power to determine alienage and prior administrative declarations of citizenship are not res adjudicata. The words limiting the subpoena's power in the statute are the same as those used in granting the power to hold hearings. Congress clearly meant to make the subpoena power as broad as the power to determine. Without the power to compel the production of evidence, the power to take it and use that taken as a basis for decision is insipid. The court concluded that the subpoena was authorized by the statute and directed that an order be issued to compel Louie Wing to appear and testify before immigration authorities.

Staff: United States Attorney Lloyd H. Burke and Assistant United States Attorney Charles Elmer Collett, (N.D. Calif.)

* * *

A P P E N D I X

FEDERAL RULES OF CRIMINAL PROCEDURE

Vol. 2 November 12, 1954 No. 23

RULE 12 - Pleadings and Motions before Trial;
Defenses and Objections
Motion Raising Defenses and Objections;
Hearing on Motion

Pre-trial hearing on motions. United States v. Giglio, et al., (S.D. N.Y.). In an opinion by Judge Palmieri dated October 21, 1954 (not yet reported), it was held, on the basis of allegations in the defendants' motions and countering affidavits, that defendants had not made a claim of sufficient "solidity" (citing Nardone v. United States, 308 U.S. 338, 342) to warrant a pre-trial hearing on motions (1) to dismiss indictments, (2) to suppress illegally obtained evidence, (3) to have a hearing to ascertain the extent of use of illegally obtained evidence to secure indictments and to determine the scope of suppression order, and (4) to inspect the grand jury minutes. Substantially similar indictments had been previously dismissed (United States v. Lawn, 115 F. Supp. 874, (S.D. N.Y.)), on the ground that the defendants were wrongfully called before the grand jury, and the defendants' records produced in response to the grand jury subpoenas had been ordered returned to them. The Government affidavits, relied on to deny the hearing on the motions filed against the subsequent indictments, established to the district court's satisfaction that the new indictments rested on evidence secured independently of and prior to the disclosure of the tainted evidence to the Revenue Service's investigators. Relying on these affidavits, the motion to dismiss was denied; the motion to suppress was denied as an objection to be raised if illegal evidence were to be used at the trial; and no basis was found for inspection of the grand jury minutes.

INDEX