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BULLETIN

RESTRICTED TO USE OF

DEPARTMENT OF JUSTICE PERSONNEL

UNITED STATES ATTORNEYS BULLETIN

Vol. 5 July 5, 1957 No. 14

NEED FOR PROMPTNESS IN RULE 20 TRANSFERS

In a recent communication to the Department a District Judge has pointed out that in some districts where a defendant desires to avail himself of the provisions of Rule 20, Federal Rules of Criminal Procedure, there is an average time lapse of three or four weeks before the United States Attorney in the district where the crime was committed, forwards the pending information or indictment to the sentencing district. Such delay is unjustifiable and is in direct contravention of the instructions set out in Title 2, page 13-14, of the United States Attorneys Manual. At the top of page 14, the Manual states, "Promptness is a very necessary factor in Rule 20 transfers and all such transfers should be processed as expeditiously as possible. The use of air mail is suggested as an adjunct of such promptness." Unnecessary delay in forwarding the required papers in Rule 20 cases is not only unfair to the defendant whose incarceration is unduly prolonged thereby, but such delay also heightens the possibility that the defendant may change his mind and withdraw consent for prosecution in the arresting district. In view of this, United States Attorneys are urged to process all Rule 20 cases as expeditiously as possible.

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COMPLETED CRIMINAL CASES

Criminal cases, where all action has been completed except sentencing of the defendant, will not be counted in the "Actual Backlog" or as "Not Current" when the case is more than six months old. Accordingly, cases which are more than six months old, which are coded "213 - Awaiting Sentence" will be eliminated from the actual backlog count.

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DISTRICTS IN CURRENT STATUS

The Southern District of California should have been included in the list of districts which were in a current status, with respect to criminal cases, as of March 31, 1957.

* * *

JOB WELL DONE

The Chairman of the Atomic Energy Commission has written to the Attorney General commending Assistant United States Attorney Thomas Stueve, Southern District of Ohio, for the efficient and successful manner in which he handled a recent case involving an injunction brought under the national emergency provisions of the Labor Management Relations Act of 1947. The injunction was entered against the continuance of a work stoppage imperiling the national safety at one of the Atomic Energy Commission's installations.

The District Director of the Immigration and Naturalization Service has written to United States Attorney George E. MacKinnon, District of Minnesota, expressing personal thanks and admiration for the excellent prosecution and unusual painstaking work done by Mr. MacKinnon and Assistant United States Attorney Keith D. Kennedy in a recent case. The letter observed that the effects of the decision should be far-reaching on the work of the Service which is deeply impressed as a whole with the result of this case.

On the occasion of his leaving office, the Commanding General of the Antiaircraft and Guided Missile Center, wrote to United States Attorney Paul F. Larrazolo, District of New Mexico, commending Mr. Larrazolo and Assistant United States Attorney Joseph McNeany, for their splendid cooperation and efforts which have made missile firing possible on McGregor Range. The Commanding General stated that all members of his staff who had worked with Mr. Larrazolo's office have had only the highest praise for the extent of their endeavors and the thoroughness of all legal proceedings which have been of such great importance to the national defense.

The District Chief, Food and Drug Administration, has commended Assistant United States Attorney Henry Paul Sullivan, Eastern District of Pennsylvania, for his effective handling of a recent case. The letter observed that Mr. Sullivan was unsparing in the time and preparation he devoted to the somewhat complex case which involved drugs for parenteral use.

The interest and effective planning displayed by Assistant United States Attorney Joseph J. Zapitz, Eastern District of Pennsylvania, in a recent case, has been commended by the District Chief, Food and Drug Administration. The letter stated that the case was highly technical and unusually involved in complexities, but that Mr. Zapitz handled it with considerable skill.

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INTERNAL SECURITY DIVISION

Assistant Attorney General William F. Tompkins

INDUSTRIAL PERSONNEL SECURITY PROCEDURES

Attack on Constitutionality; Jurisdictional Defenses Raised. Robert Webb v. United States, New York Industrial Personnel Security Hearing Board, Members of New York Industrial Personnel Security Hearing Board and Radio Corporation of America. Plaintiff sought a three-judge statutory court for the purpose of considering the constitutionality of the procedures of the Department of Defense utilized in its industrial personnel security program. Plaintiff relied principally on the case of Parker v. Lester, 227 F. 2d 708, and Lester v. Parker, 235 F. 2d 787, which considered and affirmed a constitutional challenge of the port security program of the United States Coast Guard stating that the regulations on their face did not permit an administrative hearing which would comply with due process. Plaintiff also sought to enjoin the defendants preliminarily and, after hearing, permanently from enforcing as a condition of plaintiff's employment with RCA that he obtain clearance from the Industrial Personnel Security Board.

Hearing was held on June 5, 1957, before a three-judge court pursuant to plaintiff's request. Government objected to the three-judge court on the grounds that a statute was not under attack, but only the regulations. The Government also argued a number of jurisdictional defenses, failure to join indispensable parties and the fact that the plaintiff had failed to exhaust his administrative remedy. On June 17, 1957, the three-judge court was dismissed. On June 19, 1957, District Court Judge Lord held for the Government on all points and granted the Motion to Dismiss.

Staff: Assistant United States Attorney Henry Morgan (S.D. N.Y.); James T. Devine and Oran H. Waterman (Internal Security Division)

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURT OF APPEALS

CHATTEL MORTGAGES

Lien Created by Government Mortgage Prior to Agisters' Lien; Validity of After-Acquired Property Clause. United States v. M. Leroy Evans, et al (C.A. 10, June 11, 1957). In February, 1954, one Proctor obtained a loan from the Farmers Home Administration for the purpose of purchasing sheep. The loan was secured by a series of chattel mortgages on Proctor's livestock and other farm personal property in New Mexico. Each mortgage contained an after acquired property clause and was promptly recorded. In August, 1954, Proctor purchased 894 sheep with the loaned funds and placed them on premises which he had previously leased from one Evans. In February, 1955, Evans instituted suit in a state court to recover unpaid rent under the lease. The United States was joined as a party defendant and, on motion of the United States Attorney, the proceedings were removed to the Federal Court. Thereafter, the sheep remaining on the leased premises were sold and the proceeds of the sale deposited in the registry of the court. The district court held that Evans possessed an agisters' lien on Proctor's livestock and that, as to the sheep bought and placed on the leased premises in August, 1954, that lien was prior to the lien created by the after acquired property clause in the Government's mortgages.

The Court of Appeals reversed. It noted that Section 61-3-5 of the New Mexico Stat. Ann. 1953, which creates an agisters' lien for pasturage furnished for livestock of others, expressly provides that the created lien shall not take precedence over a prior filed and recorded chattel mortgage unless the holder of the mortgage shall so consent in writing. Further noting that, in New Mexico, an after acquired property clause "is valid to create a lien upon after acquired property, effective from the time of its acquisition," the Court concluded that the Government's lien was superior to the Evans' agisters' lien. The Court also rejected Evans' reliance on Section 61-6-1 of the New Mexico Statutes, which gives landlords leasing or renting agricultural lands a preference lien upon property furnished by the landlord to the tenant, and upon the crops raised on the premises, for any rent that may become due. In this connection, the Court observed that there was nothing in that section which indicated a legislative intent "to give to a landlord's lien upon crops grown on leased or rented premises and fed to livestock belonging to the tenant priority over and above a chattel mortgage lien covering the livestock at the time the tenant brought such livestock onto the leased premises."

Staff: Alan S. Rosenthal and Lino A. Graglia (Civil Division)

CONTEMPT OF COURT

Applicability of First Amendment to Speech Urging Violation of District Court Order. John Frederick Kasper v. Brittain et al. (C.A. 6, June 2, 1957). The Court of Appeals affirmed Kasper's conviction of criminal contempt arising out of the desegregation of the Clinton High School, Clinton, Tennessee. Following Brown v. Board of Education, 347 U.S. 483, the district court ordered the County School Board to desegregate the high school. When Kasper organized a movement to force the school authorities to restore segregation, they petitioned the court for injunctive relief. The Court issued an ex parte temporary restraining order prohibiting Kasper from interfering with the carrying out of the desegregation order. This restraining order was served on Kasper, and he immediately made a speech before a crowd to the effect that the restraining order did not mean anything and that the Supreme Court's decision was not the law of the land. Subsequently, there was mob violence in Clinton which required the intervention of the National Guard.

The Court of Appeals held that the First Amendment did not confer upon Kasper the right to persuade others to violate the desegregation order and that his speech was not a mere exposition of ideas but the advocacy of immediate action to accomplish an illegal result. The Court also held that the restraining order was a proper exercise of the district court's authority to enforce its decrees and that Kasper's sentence of one year's imprisonment was not cruel and unusual punishment. As an alternative ground for sustaining the contempt conviction, the Court held on the authority of Howat et al. v. State of Kansas, 258 U.S. 181, and United States v. United Mine Workers, 330 U.S. 258, that it is contempt of court to disobey an injunction order even though it may be challenged as invalid.

Staff: Donald B. MacGuineas, Warren F. Schwartz
(Civil Division)

EXCLUSION FROM MAILS

Validity of Impounding Order Issued Pursuant to 39 U.S.C. 259(b). A. S. Toberoff v. Summerfield (C.A. 9, June 7, 1957). An administrative complaint was filed in the Post Office Department, pursuant to 39 U.S.C. § 259(a), alleging that appellant, under the names of Filmcraft and Filmcraft Company, was mailing circulars giving information as to where obscene photographic materials could be obtained. After a hearing, the hearing examiner upheld the charge and recommended issuance of an "unlawful" order. While an administrative appeal from this recommendation was pending, a similar administrative complaint was filed against appellant, this time under the name of Filmfare and Filmfare Company. Stating that Toberoff was attempting to circumvent and evade the effective enforcement of 39 U.S.C. 259(a), the Post

Office issued an interim order impounding all mail to this company and sought in the district court to extend this order until the conclusion of the administrative proceedings, pursuant to 39 U.S.C. 259(b). Despite Toberoff's contentions and supporting affidavits that in changing names, he was merely attempting to avoid a lawsuit by another company for trade name infringement, the district court, finding that Toberoff's use of the Filmfare name was to evade the effect of enforcement, granted the Government's petition.

On appeal, the Court of Appeals reversed holding that whatever the reason for the change of names, it could not be said that Toberoff had interfered with the effect of enforcement proceedings against Filmcraft since no impounding order of final prohibiting order had as yet been entered in those proceedings. Filmcraft was still at liberty to receive mails barred to Filmfare when the district court's order was entered. The impounding of Filmfare mail was thus considered premature, and valid impounding proceedings against it were dependent on a prior impounding or prohibitory order against Filmcraft.

Staff: United States Attorney Laughlin E. Waters, Assistant United States Attorneys Richard A. Lavine and Marvin P. Carlock (S.D. Cal.)

FOREIGN ASSETS CONTROL REGULATIONS

Foreign Assets Control Procedures for Determining Country of Origin of Cassia (Cinnamon Bark) Upheld. Karl H. Landes and E. Balint, Inc. v. George M. Humphrey, et al. (C.A. D.C., June 13, 1957). Plaintiff spice importer, brought this action to secure the release for entry into the United States of 1300 bales of cassia, or, alternatively, a reexamination of the cassia by other methods and other persons "as might be fair, competent, impartial and qualified". The cassia in question had been denied entry under the provisions of the Foreign Assets Control Regulations (31 C.F.R. 500.204) on the ground that it was not of non-Chinese origin. The regulations prohibited the importation into the United States of cassia of Chinese origin.

Plaintiff's cassia had been submitted for examination to a panel of spice experts who determined its country of origin by its taste, smell and appearance. This method of determination had previously been found unreliable by the Treasury and reliance on it discontinued while plaintiff's cassia was en route. Since plaintiff had purchased this cassia with knowledge of the panel examination procedure, Treasury submitted its cassia to the panel examination procedure.

Plaintiff moved for summary judgment contending that the procedure set up for testing cassia was arbitrary and capricious; that a different determination, the volatile oil content of cassia bark, should have been relied on by Treasury; and that a reexamination of the bales in question should have been permitted. In granting the Government's

cross-motion for summary judgment, the district court held that defendants were neither arbitrary nor capricious in setting up the procedures for determining the origin of cassia or in execution of those procedures with respect to the bales in question; or in refusing to accept the volatile oil content of cassia bark as the basis for determination of its country of origin; or in denying entry into the United States of the bales in question; or in refusing to permit a reexamination thereof. The Court of Appeals agreed and affirmed. At the appellate stage, plaintiff contended for another method for determining country of origin: microscopic examination of the cellular structure of cassia. The Court noted that as this method had not been urged before the Treasury Department, its affirmance of the judgment below was without prejudice to plaintiff's right to request of the Treasury Department an opportunity to establish that microscopic examination is determinative of country of origin.

Staff: Andrew P. Vance (Civil Division)

INJUNCTION

Denial of Temporary Injunction Upheld Where Abuse of Discretion Demonstrated. Aloys Holzer and Lawrence Holzer v. United States, et al. (C.A. 8, June 5, 1957). In an action to quiet title to a tract of land in North Dakota, plaintiffs appealed from an order denying their motion for a temporary injunction restraining [during the pendency of the action] the United States officers involved from selling the property. The land, previously owned by plaintiffs' relatives, had allegedly been sold to third parties who had not completed payment when the United States levied upon the land in execution of a judgment against the relatives. Subsequently, the relatives assigned their interest to plaintiffs. In their complaint plaintiffs argued that under local law, the interest of a vendor which was personal property could not be levied upon and sold as real property by virtue of a judgment against him. The Government contended that its judgment became a lien on the vendors' interest and asked that the complaint be dismissed.

Recognizing that a sale of the vendors' interest rather than of the land itself was involved, the Court of Appeals held that the court below had not ruled on the key issue raised by the pleadings in denying the injunction and that the question would not be ripe for review until the trial on the merits was concluded. This was particularly true where the case turned on a question of local law; Buder v. Becker, 185 F. 2d 311 (C.A. 8). Without clear proof of the district court's abuse in denying the injunction pending trial on the merits, the order would be affirmed.

Staff: United States Attorney Robert Vogel and Assistant United States Attorney William R. Mills (D. N.D.)

RENEGOTIATION

Tax Court Proceeding for Redetermination of Excessive Profit Abates Where Contractor Failed to Make Timely Substitution of United States for Abolished War Contracts Price Adjustment Board. Ferro-Co. Corp. v. War Contracts Price Adjustment Board (C.A. D.C., June 6, 1957). By the Renegotiation Act of 1951, as amended, 50 U.S.C. App. 1211 et seq., Congress abolished the War Contracts Price Adjustment Board and provided a four year period in which, by motion or petition, the United States could be substituted as a party in any court proceeding to which the Board was a party. Affirming an order of dismissal by the Tax Court, the Court of Appeals held that a contractor's failure to move timely to have the United States substituted for the Board as the party respondent in a proceeding in the Tax Court for redetermination of excessive profits, caused the action to abate. The Court rejected the contractor's argument that the case was controlled by Chairman U. S. Maritime Com'n. v. California Eastern Lines, 204 F. 2d 398 (C.A. D.C.), where the court held that a substitution provision in the Reorganization Act of 1949 had no application to Tax Court renegotiation proceedings. Looking to the legislative history of the 1951 Renegotiation Act, the Court considered it clear that Congress intended the substitution provision of that Act to apply to Tax Court proceedings where the Board was a party respondent.

Staff: John G. Laughlin (Civil Division)

DISTRICT COURT

VETERANS AFFAIRS

Government Entitled to Indemnification by Veteran for Loss Sustained on Guaranty of G.I. Loan. United States v. Arthur Earl McKnight (S.D. Calif., May 22, 1957). In 1947 the veteran, McKnight, obtained a loan of $6,750 for the purchase of a home in California. The Veterans Administration guaranteed payment of the loan to the extent of 50% thereof under the loan guaranty provisions of the Servicemen's Readjustment Act of 1944, 38 U.S.C. 694, et seq. The veteran defaulted after making one payment on the loan and the Veterans Administration paid the lender $3,375 on the basis of its guaranty. The lender foreclosed, bid in the property at the upset price of $5,500 set by the Veterans Administration and later elected to transfer the property to the Veterans Administration. The resulting net loss to the Veterans Administration of $1,453.64 was certified to the Department of Justice for collection. Inasmuch as the California anti-deficiency judgment law precluded recovery against the veteran on the theory of subrogation, suit was predicated upon the Government's right to be indemnified as provided by 38 C.F.R. 36.4323(e). The veteran vigorously defended the suit challenging the validity of the regulation and further contending that the Veterans Administration did not suffer as much loss as claimed in view of the price for which the property was ultimately resold.

The Court upheld the validity of the indemnity regulation and entered judgment in favor of the United States for the full amount of the claim with interest. The victory is significant inasmuch as United States v. Henderson, 121 F. Supp. 343 (S.D. Iowa) is the only reported decision to date upholding the Government's right to recover on the indemnity theory. For a further discussion of the Government's right to be indemnified, under the circumstances referred to herein, see pages 427-428 of the Veterans Affairs Practice Manual.

Staff: United States Attorney Laughlin E. Waters, Assistant United States Attorneys Richard A. Lavine and Jordan A. Dreifus (S.D. Cal.) and Katherine Kilby (Civil Division).

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CRIMINAL DIVISION

Assistant Attorney General Warren Olney III

NARCOTICS

All United States Attorneys are advised that in prosecutions under 21 U.S.C. 176b, relating to the sale of heroin to persons under 18 years of age, the Department considers it essential that there exist evidence showing the seller had knowledge that the juvenile purchasing the drug was under 18 years of age. While the circumstances surrounding the transaction may at times indicate unequivocally that the defendant was aware of his customer's tender age, where the juvenile's age approaches that which would render 21 U.S.C. 176b inapplicable, his mere youthful appearance would not be regarded as sufficient, in and of itself, to satisfy this requirement of knowledge.

WIRETAPPING

United States v. James Butler Elkins and Raymond Frederick Clark (D. Ore.). On February 4, 1957, a Federal grand jury returned an indictment against James Butler Elkins, an alleged power in political and underworld activities in Portland, Oregon, and Raymond Frederick Clark, a reputed employee of Elkins, charging them in eight substantive counts and one conspiracy count with violating the "wiretapping" statute. On May 11, 1957, after a long and hard-fought jury trial, both defendants were found guilty on seven counts. On May 22, 1957, Elkins was sentenced to imprisonment for a total of 20 months and fined in the total sum of $2,000. Clark was sentenced to serve a total of 6 months in prison and fined in the total sum of $500.

Staff: United States Attorney Clarence E. Luckey (D. Ore.).

DENATURALIZATION

Concealment of Arrests, Absence, Membership in Communist Party; Materiality. United States v. Joseph William Chandler (D. Md., June 13, 1957). Defendant was naturalized on May 14, 1943, under Section 701 of the Nationality Act of 1940 while a member of our armed forces. This suit for revocation, brought under Section 340(a) of the Immigration and Nationality Act of 1952, charged that the naturalization was procured by concealment of material facts and wilful misrepresentation. At trial, the naturalization examiner testified that in the 1943 naturalization proceedings, defendant had sworn he had never been out of the United States since his original entry in 1923; that he had never been arrested at any time; and that he had never been a Communist.

The Government proved defendant had been charged with the following violations: February 14, 1930, inciting to riot, discharged; September 1, 1930, participating in unauthorized meeting, disorderly conduct, resisting arrest, fined $50; June 1, 1931, inciting to riot, dismissed; March 1932, indicted for unlawfully possessing literature advocating criminal syndicalism and sedition, never arrested. It was also established that in November 1932, defendant left the United States on a false passport in an assumed identity and went to Moscow where he attended the Lenin School. It was conceded that his subsequent return to the United States was illegal.

Witnesses testified that in 1930 he was district organizer of the Young Communist League. About 1934 he became district organizer of the Communist Party. He was an active member of the Party and attended closed Party meetings from 1930 through 1936. He addressed open Communist meetings in 1937 but there is no evidence that he attended any other closed meetings until 1946, when he joined the District of Columbia Communist Party.

The Court found that, while defendant may not have been technically a member of the Party when naturalized in 1943, he was thoroughly familiar with and committed to its ultimate objectives, including the overthrow, by force and violence if necessary, of the Government of the United States. The Court concluded that he lacked attachment to the principles of our Constitution and did not take the oath of allegiance in good faith. The Court also found that defendant's concealments of his arrests, his absence and his Communist Party membership were all material, as they thwarted investigation which could have led to facts showing his ineligibility for naturalization.

The opinion mentioned that at the trial, which had preceded the Supreme Court's decision in Jencks v. United States, the Court on defendant's motion had required the Government to produce, for in camera inspection, certain statements furnished by Government witnesses to the Federal Bureau of Investigation and Immigration and Naturalization Service and reports of their agents of conversations with the witnesses. Most of the statements and reports referred to persons other than the defendant; some dealt at length with his activities; some merely mentioned him among those present at certain meetings, and some were bare summaries of conversations with one of the witnesses. Various rulings were made at trial. Many of the statements and reports were shown to defendant's counsel, some with the name of the investigator eliminated. Some were not shown, after examination by the Court revealed that they were essentially the same as other reports already shown to counsel. In some instances, what defendant's counsel wished to prove was that defendant's name was not included in a list, or that some activity on his part was not mentioned in a report. In those instances the facts were noted in the record, but defendant's counsel was not permitted to

read the reports dealing with other persons. Defendant's counsel disclaimed any such desire and in most instances declared himself satisfied with the sufficiency of the information supplied.

Staff: United States Attorney Leon H. A. Pierson and Assistant United States Attorney James A. Langrall (D. Md.); Maurice A. Roberts (Criminal Division)

Affidavit Showing Good Cause; Sufficiency. United States v. Matles (C.A. 2, June 10, 1957). On November 26, 1952, an attorney of the Immigration and Naturalization Service executed an affidavit showing good cause for the revocation of defendant's naturalization, based on matters appearing in the records of the Service. A denaturalization complaint was filed on December 16, 1952, but the affidavit was not. On September 16, 1953, when an amended complaint was filed, the affidavit accompanied it. In the Summer of 1956, the Government sought to take defendant's deposition before trial. On his refusal to be sworn, he was taken before the district court, which directed that he be sworn. On again refusing, he was held in contempt. On this appeal from the contempt judgment, he contended that the district court lacked jurisdiction because (1) the affidavit was a jurisdictional prerequisite to the initiation of the proceeding, which could not be met by belated filing; (2) the affidavit was insufficient because not based on the personal knowledge of the affiant. He also contended (3) that denaturalization proceedings are sufficiently criminal in their nature to permit the defendant to refuse to take the stand on grounds of self-incrimination.

The Court of Appeals affirmed. On the question of late filing, it found nothing in the case of United States v. Zucca, 351 U.S. 91, to require the conclusion that the affidavit must be filed with the original complaint. On the question of the affidavit's sufficiency, the Court concluded that to require the affidavit to be made by someone with personal knowledge of the facts would mean that confidential informants would have to be disclosed long in advance of trial. The Court found nothing in the majority opinion in Zucca to compel such a result. With respect to the third question, the Court concluded that denaturalization is a civil proceeding and governed by the Federal Rules of Civil Procedure, despite the gravity of its possible consequences. The party sought to be examined must therefore be sworn and can claim his privilege only with respect to specific questions.

Staff: United States Attorney Leonard P. Moore; Assistant United States Attorneys Cornelius J. Wickersham, Jr., and Howard B. Gliedman (E.D. N.Y.).

Affidavit Showing Good Cause; Sufficiency. United States v. Lucchese (C.A. 2, June 17, 1957). On November 17, 1952, a verified complaint was filed to revoke defendant's naturalization under Section 338(a) of the Nationality Act of 1940 as illegally and fraudulently procured. The complaint charged that defendant had testified falsely in the naturalization proceedings concerning his criminal record and aliases used (giving details) and was not a person of good moral character during the period required by law. The verification in the complaint, made by the United States Attorney, referred to "correspondence, papers and reports" as the source of information. Defendant moved to dismiss the complaint as unsupported by the required statutory affidavit. The Government thereupon filed an affidavit executed by an attorney for the Immigration and Naturalization Service on November 17, 1952, the same date the complaint was filed. The affidavit charged the naturalization was fraudulently and illegally procured, "as more fully appears from the attached complaint." Following the Supreme Court's decision in United States v. Zucca, 351 U.S. 91, the court dismissed the complaint, holding that belated filing of the affidavit did not meet the statutory requirements.

On the Government's appeal, the Court of Appeals followed its decision of June 10, 1957, in United States v. Matles (see p. 420 , supra), holding that delayed filing of the affidavit does not defeat jurisdiction. On the question of the affidavit's internal sufficiency, the Court of Appeals held that the detailed averments of the complaint, incorporated by reference in the affidavit, brought the latter up to the Zucca standards. It rejected as frivolous the appellee's argument that this attempted incorporation by reference was ineffective because no complaint was attached to the affidavit as filed and he therefore could not know that the complaint on file was intended.

The appellee also argued that the complaint was based upon records of the Immigration and Naturalization Service and Federal Bureau of Investigation instead of on an affidavit of good cause, as required by the statute. He contended that the affidavit must be the source of the information on which the Government bases its action and the affidavit must therefore be in existence before the complaint. That was not true here, he charged, because the affidavit referred to the already existing complaint.

The Court of Appeals rejecting this argument, pointed out that the "correspondence, papers and reports" referred to in the complaint's verification was broad enough to include an affidavit. As for the question whether the complaint had preceded the affidavit in point of time, the Court adverted to the fact that both bore the same date and concluded that both were drawn up at about the same time. This, felt the Court, met the objection that Congress sought to guard against in the affidavit requirement, viz., that suits with such serious consequences might be started without careful preliminary study and a

simultaneous finding that there was good cause for bringing the action.

The order of the district court dismissing the complaint was accordingly reversed.

Staff: United States Attorney Leonard P. Moore; Assistant United States Attorney Elliot S. Greenspan (E.D. N.Y.).

Survival of Illegal Procurement as Ground for Revocation; Sufficiency of Affidavit Showing Good Cause. United States v. Celia Feller Miller (N.D. Calif., June 14, 1957). Defendant was naturalized in 1944. At that time, Section 338(a) of the Nationality Act of 1940 authorized revocation of naturalization fraudulently or illegally procured. The 1940 Act was repealed and replaced by the Immigration and Nationality Act of 1952. Section 340(a) of the latter authorized revocation of naturalization procured by concealment of a material fact or by wilful misrepresentation.

The instant denaturalization complaint was filed in 1954. It charged that defendant had procured her naturalization by concealment of material facts and by wilful misrepresentation in that she had testified falsely in the naturalization proceedings concerning her antecedent membership in the Communist Party. It also charged that the naturalization had been illegally procured in violation of the 1940 Act, as continued in force and effect by the 1952 Act's savings clause. The affidavit showing good cause for revocation, executed by an attorney of the Immigration and Naturalization Service on the basis of materials appearing in the Service's file, was in the possession of the United States Attorney when the complaint was filed, but was not filed until some time later.

Defendant moved to dismiss the complaint on the ground that it was not supported by an affidavit of good cause, charging (1) that the absence of the affidavit was a jurisdictional defect which could not be cured by late filing; and (2) that the affidavit as filed was insufficient because not based on the affiant's personal knowledge. Defendant also moved to strike those portions of the complaint charging illegal procurement, on the ground that this cause for revocation did not survive repeal of the 1940 Act.

The Court denied the motion to dismiss, holding that the affidavit was not jurisdictional and that its contents were adequate. However, the Court granted the motion to strike the reference to illegal procurement. It concluded that, in view of Section 340(i) of the 1952 Act, making its denaturalization provisions applicable to prior naturalizations, the 1952 Act's grounds were exclusive and the 1940 Act's grounds were not preserved by the savings clause.

Staff: United States Attorney Lloyd H. Burke; Assistant United States Attorney William B. Spohn (N.D. Calif.).

WAGERING TAXES

Internal Revenue; Liability to $50 Special Occupational Tax by So-called "Pick-up" Men. United States v. Calamaro (Supreme Court, June 17, 1957). The Court of Appeals for the Third Circuit had held (236 F. 2d 182) that a pick-up man (one who collects the wagering slips from the "writers" and delivers them to the "banker") was not subject to the tax under section 3290 of the Internal Revenue Code of 1939, holding that it is the writer who "receives" the wager, the pick-up man being a mere messenger. The Supreme Court granted certiorari to resolve the conflict with Sagonias v. United States, 223 F. 2d 146, and affirmed the ruling of the Third Circuit in this case.

The Court agreed with the Third Circuit's view that the "placing" and "receiving" of a wager are but "opposite sides of a single coin"; that it is the making of a gambling contract, not the transportation of a piece of paper, to which the statute refers; hence it is the writer and not the pick-up man who is "engaged in receiving wagers" within the meaning of section 3290.

Nor could the Court see anything in the registration provisions of section 3291 which points to the pick-up man as being considered a "receiver" of wagers. Conceding that these provisions as well as the occupational tax itself were designed, at least in part, to facilitate collection of the excise tax, and that the more participants in a gambling enterprise are swept within these provisions, the more likely it is that information making possible the collection of the tax will be secured, the Court felt itself constrained by what it considered Congress' manifest intent not to subject all employees of gambling enterprises to the tax and reporting requirements, but only those actually engaged in receiving wagers, which as noted above the Court interpreted as meaning receiving in the contractual sense.

The Court was likewise not persuaded by the administrative interpretation of the statute, nor by its reenactment, in haec verba, in the 1954 Code, noting that the regulation had been in effect for only three years, there was nothing to indicate that it was ever called to the attention of Congress, and the reenactment of section 3290 had not been accompanied by any Congressional discussion which would throw light on its intended scope.

Justice Burton dissented, contending that section 3290 did not limit the occupational tax to persons "accepting wagers" in the contractual sense.

GAMBLING DEVICES

Internal Revenue; Tax on Coin-operated Gambling Devices. United States v. Walter Korpan (Supreme Court, June 17, 1957). The Supreme Court has reversed the decision of the Court of Appeals for the Seventh Circuit (237 F. 2d 676) and reinstated Korpan's conviction by the trial court upon charges of willfully failing to pay the $250 per device tax imposed by 26 U.S.C. 4461 upon any person maintaining or permitting the use on his premises of a coin-operated gaming device as defined in 26 U.S.C. 4462(a)(2). The Seventh Circuit had held that, while there was little doubt that the devices in question (advanced types of "pin-ball" machines having specialized gambling features) were gambling devices, the crucial issue was whether they were "so-called slot machines" as defined by section 4462(a)(2).

In reversing, the Supreme Court stated that it is clear that respondent's machines were operated by the insertion of a coin and that persons playing them could receive cash for any free games won; that the machines involved an element of chance, although skill may have had some part in playing them successfully; and they were, in short "slot-machine" gambling devices. Thus the Court adopted the broad dictionary definition of "slot-machine" and rejected the respondent's contention that when Congress used the phrase "so-called 'slot' machines" in section 4462(a)(2) it intended to restrict the scope of that section to those "slot-machine" gambling devices colloquially known as "one-armed bandits". The Court was unable to discern any manifest intent on the face of section 4462(a)(2) and related sections to limit the application of its otherwise broad terms to any particular kind of slot-machine gambling device, and observed that the phrase "so-called 'slot' machine" is, if anything, more consistent with the position advanced by the Government than that taken by Korpan. Moreover, the Court found that this interpretation is supported by the relevant legislative history and by the administrative interpretation of section 4462(a)(2) since 1942. The Court also noted that if the respondent's position were adopted section 4462(a)(2) would be restricted to a peculiar type of gambling device -- the so-called "one-armed bandit" -- even though ingenuity, a desire to avoid taxes, and technological progress provide a multitude of new devices which permit substantially the same kind of gambling but only with a different kind of coin-operated machine. The Court was convinced that Congress had no such purpose and meant only to distinguish between "slot-machines" operated as gambling devices and "slot-machines" which were used exclusively for amusement.

The way is now clear for the prosecution of all cases involving failure to pay tax under 26 U.S.C. 4461 on all types of coin-operated devices used for gambling purposes.

As will be noted, this case involved only the question of the taxability under the Internal Revenue Code of coin-operated devices, and did not concern the question of what type of machines fall within the scope of the Johnson-Preston Act (Slot Machine Act, 15 U.S.C. 1171-1178), although the Seventh Circuit, by way of dicta in its opinion in Korpan (reversed herein) had spontaneously injected the suggestion that the machines involved herein would likewise not fall within the definition of "slot-machine" as contained in that Act.

Still pending before the Court of Appeals for the Ninth Circuit is the Hanifin (Pointmaker) case which concerns the question of whether the inter-state transportation of the electronic successors to the so-called "one-armed bandit" slot machine is prohibited by the Slot Machine Act. The decision will be reported in the Bulletin as soon as received.

MOTORBOAT ACT

Reckless or Negligent Operation of Vessels. United States v. Utah Dredging Company and Clell Horton (N.D. Calif.). A Coast Guard officer, who was investigating a complaint, found eleven employees of the Utah Dredging Company being embarked on a 14-foot outboard motorboat owned and operated by the Company to take employees and equipment out to its dredges. Such overloading left very little freeboard, and only two life jackets were found aboard the boat. Although a warning was issued, overloading of the motorboat with men and machinery continued, the only improvement being that there were five life jackets aboard. An information in three counts was filed charging the Company and the individual operator with operating the motorboat in a negligent and reckless manner so as to endanger the lives and limbs of the persons on board, in violation of the provisions of 46 U.S.C. 526(l) and (m). On March 20, 1957, both defendants pleaded nolo contendere. After testimony by the Coast Guard officer, the District Judge found both defendants guilty. The Company was fined $500, and the employee $10.

The case is of considerable interest since there have been few convictions under the Motorboat Act for overloading. It is of particular interest that there were no casualties, loss of life, injuries, or damage to property, and that the corporate owner, as well as the individual operator, was convicted of negligent operation of the boat. Subsequently, an official of the Company thanked the Government for bringing this dangerous situation to the Company's attention so forcefully, and the Company purchased two additional motorboats and equipped its boats with all required safety equipment.

Staff: United States Attorney Lloyd H. Burke;
Assistant United States Attorney
Richard Foster (N.D. Calif.).

IMPERSONATION CONSPIRACY

Forging Signature of Court Officer. United States v. Mildred Peyton Davis and Aline Lynch (W.D. Ky.). On May 29, 1957, Mildred Peyton Davis and Aline Lynch were convicted of conspiracy to represent Mrs. Lynch as an FBI agent who had been assigned to guard Mrs. Davis. The latter was also found guilty of pretending that Mrs. Lynch was an FBI agent and, in addition, pleaded guilty to two counts of forging the signature of an officer of a court of the United States for the purpose of authenticating certain documents.

Mrs. Davis concocted a fantastic scheme to obtain money fraudulently by claiming she had inherited $200,000,000 from her father who, she claimed, had in turn inherited the estate from the widow of the founder of the Mars Candy Company. As part of the scheme, Mrs. Davis forged the signature of the Deputy Clerk of the District Court at Owensboro, Kentucky, to several documents one of which purported to be a letter from the Court reflecting that the assets of the estate included Mars Candy stock valued at $1,500,000; Standard Oil stock, $2,000,000; property, $100,000,000; personal effects, $2,000,000; King Ranch stock, $3,000,000; thoroughbred race horses, $1,500,000; insurance, $20,000; cash in hand, $5,000,000. Mrs. Davis further claimed she would inherit farms in Canada, Cuba, Australia, and England and uranium property in Alaska. She also forged a document purporting to be a refusal by a bank to lend her $2,700,000 for the reason that she had a savings account of $2,000,000 in the bank.

The only person apparently bilked by Mrs. Davis was a cousin who loaned her $28,000. He testified she had shown him a letter allegedly signed by the FBI agent in charge of the Louisville office, addressed to a hospital superintendent requesting that Mrs. Davis be given the best possible care and stating that because of her rare type of blood the FBI had two donors standing by in case of emergency. Mrs. Davis asserted she had been told by a person, subsequently identified as Mrs. Lynch's husband, that he had been assigned by the Federal Bureau of Investigation to protect her because her life was in danger. She claimed Mrs. Lynch later took over his duties because he was ill. Mrs. Lynch denied this and testified that Mrs. Davis had caused her to close her beauty shop when she was hired as her personal beautician and bodyguard. Thereafter Mrs. Davis introduced Mrs. Lynch as a bodyguard assigned by the Federal Bureau of Investigation.

An attorney who represented Mrs. Davis for approximately nine months in connection with her supposed inheritance testified that he was so convinced of her sincerity that he had given up all other law practice to handle her affairs exclusively. He denied Mrs. Davis' testimony that he had ordered flowers sent to her mother's funeral in the names of United States Attorney Walker and Judge Shelbourne who was hearing the case.

The evidence disclosed that Mrs. Davis' father had died in a poorhouse in 1930.

Staff: United States Attorney J. Leonard Walker (W.D. Ky.).

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
District Court Decision

Injunctive Relief Denied With Respect to Civil Penalties and Sale of Partnership Interest. William W. Yates and Mabel Reed Yates v. H. J. White, (S.D. Ill., June 4, 1957.) In this case the Court held that taxpayer was not entitled to injunctive relief restraining the collection of taxes and civil penalties incurred by William W. Yates, a responsible officer of the Corn Belt Motor Company and the Yates Motor Company, for failure to collect withholding taxes from the wages of employees of those companies. The Court also held the interest of William Yates in a family partnership to be subject to distraint for the satisfaction of delinquent taxes and penalties. As stated by the court: "This Court is not convinced that seizure and sale of the property herein will ruin the petitioner financially and the Court is of the opinion that the petitioner has an adequate remedy both through administrative procedure and after the payment of the tax a procedure for refund is available. Under these circumstances it is the opinion of the Court that this is not a proper case for injunctive relief. Hardship in raising money with which to pay taxes is now common to all taxpayers but this is not a special circumstance conferring equity and jurisdiction upon the courts to prevent collection by injunctive process."

Staff: Assistant United States Attorney Mark Alexander (S.D. Ill.) George T. Rita (Tax Division)

CRIMINAL TAX MATTERS
Appellate Decisions

Supreme Court Action. On June 24, 1957, the Supreme Court denied the petition for rehearing in Achilli v. United States, wherein it was held that Section 3616(a) of the Internal Revenue Code of 1939 does not apply to the income tax.

Appeal from Dismissal of Indictment; Suppression of Evidence; Appellate Court's Jurisdiction. United States v. Ashby (C.A. 5, June 14, 1957.) Taxpayer's business records were turned over to the Internal Revenue Service by his wife when their divorce suit was pending. Following his indictment for failure to file income tax returns, he moved to suppress his records on the grounds that his wife had turned them over without his knowledge or consent, and out of anger and a desire to injure him. The district court granted the motion and dismissed the indictment. On appeal taxpayer contended that (1) the dismissal was not appealable because it was merely

incidental to the ruling on the motion to suppress, and (2) the district court's decision was correct on the merits. The Court of Appeals reversed the dismissal and the suppression order, stating: "The appellee, in support of his position that the court's order is not appealable, cites and relies upon United States v. Janitz, 3 Cir. 1947, 161 Fed. (2d) 19.* * * In the Janitz case, however, the trial had commenced and the defendants had been placed in jeopardy. The dismissal of the indictment was the equivalent of an acquittal. In the case before us there was a dismissal of the indictment and under Section 3731 [of the Criminal Code] the order was subject to appeal. Any other conclusion would, as shown by the Court of Appeals of the Fourth Circuit, 'forever and irremediably condemn the prosecution's case before trial.' United States v. Ponder, 4 Cir. 1956, 238 Fed. (2d) 825, 829.

* * * * *

But it does not appear that she has testified or will testify against him. All she did was to make available to the agents records showing or indicating the possibility of a community tax liability of her husband and herself. The records were in no sense a communication between husband and wife and in no sense confidential as between them.

"The doctrines announced by the Supreme Court in Burdeau v. McDowell, 256 U.S. 465, have put at rest the contentions of the appellant * * * The papers having come into the possession of the government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character."

Staff: United States Attorney Heard L. Floore, Assistant
United States Attorney William N. Hamilton (N.D. Texas)

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ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT

First Imposition of New Maximum Fines Under Sherman Act; Highest Fine Ever Imposed on Individual in Sherman Act Case. United States v. Safeway Stores, Incorporated, et al., (N.D. Texas). On June 3, 1957, Judge Joe E. Estes accepted pleas of nolo contendere from all of the defendants, after arguments during which the Government opposed their acceptance. Upon entry of the pleas, the Court issued a written opinion stating that it believes the most practical way to dispose of these matters is to accept the nolo contendere pleas; that the Government owes no duty to private treble damage litigants; and that the rights of those litigants may be protected by the Government proceeding to trial on the pending civil case.

On June 18, 1957, the Court imposed sentence after argument on the factors which should be considered in connection with sentencing. The Court requested that the Government make no recommendations concerning the sentences to be imposed because he considered this to be his province.

Count I of the indictment charged a conspiracy to monopolize; Count II charged an attempt to monopolize; and Count III charged a violation of Section 3 of the Robinson-Patman Act.

The total of $187,500 in fines and the probated prison sentences imposed by the Court were as follows:

Safeway Stores, Inc.		Lingan A. Warren	Earl Cliff
Count I	$50,000	Count I, $35,000, together with a sentence of one year's imprisonment to be probated	Count I, $4,000 together with one year's prison sentence to be probated
Count II	$50,000	Count II, $35,000, together with one year's imprisonment to be probated and to run concurrently with the prison sentence in Count I	Count II, $3,500
Count III	$ 5,000	Count III, $5,000	(Was not a defendant in Count III)

This is the first time any court has imposed the new maximum penalty of $50,000 for Sherman Act violations. The fines on Safeway are the largest fines ever imposed on a single corporation under either act in question. The fines on the defendant Warren are the largest fines ever imposed on a single individual in an antitrust case. The fines under Count III are the first fines ever imposed under Section 3 of the Robinson-Patman Act.

The original indictment in this case was returned on July 7, 1955, the date on which the penalty was changed by law. The Government's Information which was substituted for the indictment was filed on November 1, 1955. In the arguments concerning whether the pleas should be accepted, defendants conceded that as a technical legal matter the new penalty could apply, but argued as a practical matter it should not be applied. This argument was based upon the contention that most of the conduct to which the case related occurred before the new penalty.

This was the sixth time that Safeway had been criminally prosecuted under the Sherman Act and the fifth time it had pled nolo contendere.

Staff: Margaret H. Brass and Paul A. Owens (Antitrust Division)

Boycotting - Fair Trade. United States v. Nassau and Suffolk County Retail Hardware Association, Inc., (E.D. N.Y.). On June 18, 1957, a Brooklyn grand jury returned an indictment against the defendant named above. This is the result, so far, of our extensive investigation into alleged collusive activities by "old line" retailers on Long Island and others to prevent distribution of certain products through discount houses. The grand jury investigation is continuing concerning certain other products. The present indictment charges a combination and conspiracy in violation of Section 1 of the Sherman Act, among the defendant and co-conspiring member and non-member retailers of hardware and housewares in the Long Island area, manufacturers, wholesalers, and jobbers of hardware and housewares. The terms of the alleged conspiracy are: (a) suppliers of hardware and housewares should discontinue all business relations with discount houses in the Long Island area; (b) manufacturers of hardware and housewares should prevent distributors, jobbers and wholesalers of their products from reselling such products to discount houses in the Long Island area; (c) retailers should boycott and refuse to deal with manufacturers of products resold in discount houses and with suppliers of merchandise to discount houses; and (d) manufacturers of hardware and housewares should fix, by means of so-called fair trade contracts, the retail prices at which their products are resold in the Long Island area.

Staff: Richard B. O'Donnell, Augustus A. Marchetti, Joseph T. Maioriello, Donald A. Kinkaid and Philip Bloom. (Antitrust Division)

Price Fixing. United States v. Erie County Malt Beverage Distributors Association, et al., (W.D. Pa.). On June 15, 1957, after deliberation extending over two days, the jury returned guilty verdicts against each of the defendants. Sentencing was deferred pending completion of a probation officer report. Defendants obtained time until July 15, 1957, to file motions for a new trial and an arrest of judgment.

The offense consisted of a combination and conspiracy among two beer distributors associations in Erie County, Pennsylvania, one corporate and six individual members of said association, to fix case lot prices on beer, uniform markups and delivery charges, and to boycott non-conforming distributors and brewers, all in violation of Section 1 of the Sherman Act. The value of yearly trade involved amounted to approximately $6,700,000.

Staff: William L. Maher, Donald G. Balthis, John E. Sarbaugh, James P. Tofani and John J. Hughes. (Antitrust Division)

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LANDS DIVISION

Assistant Attorney General Perry W. Morton

National Forest; Provision for Double Damages in Contract for Cutting Undesignated Trees Penalty. United States v. J. C. Martin Lumber Co. (C.A. 5). This was a suit by the Government to recover under a timber sale agreement for trees which were not designated for cutting. The agreement provided for the payment of double the contract price in the event of such cutting. The district court held that the timber was cut by an independent contractor and delivered to the purchaser and used for its gain, but the purchaser did not know of the unauthorized cutting and was not liable for more than the fair market value of the timber. If the purchaser had knowingly received and used the timber it would have been liable for double the contract price, which the court called a "penalty."

The Government appealed on the ground that the provision for double the contract price for the cutting of undesignated timber was enforceable whether the timber was cut by the purchaser or his contractor, and regardless of the purchaser's knowledge of the cutting. It was argued that the provision was "liquidated damages" and not a penalty. The Court of Appeals held that the provision was a penalty though denominated one for "liquidated damages." It stated that this construction plainly appears on the face of the clause which, "without discrimination, provides the same penalty for leaving marked trees uncut as for cutting unmarked trees, and, as to trees injured through carelessness, provides the same penalty without regard to the extent in each case of the injury, and further provides that the double payment when made shall not release the purchasers from liability for any damage to the United States other than the value of said trees."

The question whether a petition for writ of certiorari should be filed is now under consideration.

Staff: Elizabeth Dudley (Lands Division)

Taking; Deprivation of Physical Possession by Government Insufficient; Claim Under Anti-Assignment of Claims Act Arose Only on Filing Declaration of Taking. Dow v. United States, Sup. Ct., No. 904. On May 27, 1957, the Supreme Court granted the Government's petition to review the decision of the Court of Appeals for the Fifth Circuit in this case. See 5 U.S. Attys Bull., No. 1, p. 26.

Staff: Roger P. Marquis (Lands Division)

Housing; Federal Housing Act of 1949, 42 U.S.C. 1451; Constitutionality of c. 114, Public Acts of Tennessee of 1945; Validity of City of Nashville Urban Redevelopment Plan. Starr, et al. v. The Nashville Housing Authority, et al., Sup. Ct., No. 936. An appeal was taken to the Supreme Court from the judgment of the three-judge district court in this case. See 4 U.S. Attys Bull., No. 24, p. 770. On June 17, 1957, the court granted our motion to affirm, citing Berman v. Parker, 348 U.S. 26.

Staff: Roger P. Marquis (Lands Division)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Judicial Review; Repetitious Actions. Cruz-Sanchez v. Robinson, (C.A. 9, June 15, 1957). Appeal from decision dismissing declaratory judgment proceedings to review deportation order. (See Bulletin Vol. 3, No. 26, p. 26; 136 F. Supp. 52). Affirmed.

This alien filed a petition for habeas corpus to review an order of deportation against him and, after hearing, the writ was discharged on September 22, 1955. On the same day he filed in the same court an action for declaratory judgment and judicial review reciting the application for and denial of the writ of habeas corpus. The petition was ordered dismissed for failure to set forth a claim upon which relief could be granted. In effect, the district court held that the alien was not entitled to repetitious review of the deportation order.

In a lengthy opinion, the Court of Appeals sustained the lower court's position, stating that under the conditions in this case the alien is in a dilemma, impossible of solution. Either he presented all the matters possible for him to present in a habeas corpus proceeding or he deliberatley failed to present there pertinent evidence which at that time he knew existed. In either event, the issue presented to the trial court was whether there was anything in the petition for declaratory judgment which could have been presented to the court in the habeas corpus proceeding. The trial court held not and the Court of Appeals agreed.

The Court discussed various phases of res adjudicata in connection with the repetitious review sought in this case and the scope of review in deportation proceedings in habeas corpus and declaratory judgment actions brought under the Administrative Procedure Act. It said it found nothing in the statutes or in decisions called to its attention which permits cumulative remedies by habeas corpus and declaratory petition, respectively or in reverse order, against the same order of deportation or the same proceedings upon which it is based. The substance of deportation order review is set by the Immigration and Nationality Act and whatever the procedural vehicle, the quality and limitations of the examination and the review are thus prescribed.

This alien had a complete review in habeas corpus. The trial court there made all the essential findings required by either the Administrative Procedure Act or the Immigration and Nationality Act, either in the standards of review of evidence, due process, or in other fields. In the declaratory petition, the alien set up nothing which had not been passed upon already. There is a further guarantee of the conclusiveness of the first judgment. No subsequent events had changed the situation, since the declaratory petition was filed the day the judgment in habeas corpus was entered. Furthermore, no excuse is alleged for failure to set up all

grounds for relief in the habeas corpus proceedings. The latter matters are not necessary to support the position taken by the trial court. Mention of them is only made because of the fact that appellant has gained an inordinate amount of time by an appeal in which there is no merit.

One judge dissented, basing his action upon the belief that the review scope of habeas corpus is not the same as that of a declaratory judgment action in deportation and exclusion cases and that the relief accorded in such cases is not exactly the same as that of the other.

Evidence; Claim of Fifth Amendment in Deportation Proceedings; Inferences from Claim; Burden of Proof. Goncalves-Rosa v. Shaughnessy, (S.D. N.Y., June 10, 1957). Declaratory judgment proceedings to review deportation order.

Deportation proceedings were commenced against plaintiff in October 18, 1956, after he had made a preliminary sworn statement to an immigration officer indicating that he had intended to remain in the United States permanently when at the time of his entry he was admitted only in transit to Costa Rica. At his deportation hearing he refused to offer evidence and in declining to answer questions, invoked the Fifth Amendment. The Special Inquiry Officer admitted documentary evidence, including the preliminary sworn statement made by the alien, his passport and the Service record relating to his admission in transit. On this evidence, he was ordered deported. He alleged the proceedings were invalid, among other reasons, because the Government presented no testimony to support the charge against him and the Special Inquiry Officer inferred from plaintiff's refusal to testify on grounds of self-incrimination that if he had testified his answers would have admitted the facts necessary to support the deportation charge.

The Court rejected these various contentions, pointing out that he had voluntarily made the sworn statement on October 18, 1956, and that under the applicable regulations that statement could be entered of record. The court said it has long been settled in the Second Circuit that an alien's voluntary statements, understandingly made, as to alienage and purpose of entry into the United States, may properly be received in evidence at a subsequent hearing in which the alien is represented by counsel and where he is given the opportunity to cross-examine witnesses and to offer additional testimony in his own behalf. This alien, however, made no effort to rebut any portion of the preliminary statement, preferring to stand mute. The opportunity to testify which was thus given to him complied with the requirements of section 242(b)(3) of the Immigration and Nationality Act. Failure to avail himself of this reasonable opportunity does not render the hearing unfair. The other records were properly admissible. He was not deprived of due process in any respect and the conclusions of the Special Inquiry Officer were fully justified. The alien's deportability has been established by his own admissions, which constitute substantive evidence and the record is sufficient to comply with the requirement that a decision of deportability must be based upon reasonable, substantial and probative evidence.

It was not necessary for the Special Inquiry Officer to draw any inference from the alien's refusal to testify, even though it may be that such inferences may be so drawn. There was sufficient evidence in the record without such inference. This is not a case in which the alien is being deprived of any rights because of his invocation of the Fifth Amendment. There is sufficient documentary proof to warrant deportation, and merely because he sought to make no response should not be accepted as supporting his contention that he was deprived of his constitutional rights. Once the Government has established that the person sought to be deported is in fact an alien, the burden shifts to the alien to prove his right to remain in the United States. This alien preferred to remain mute rather than attempt to sustain that burden. There was sufficient in the record from the documents to show that plaintiff was an alien.

The Government's motion for summary judgment was granted.

Staff: United States Attorney Paul W. Williams, Special Assistant United States Attorney Charles J. Hartenstine, Jr. of counsel (S.D. N.Y.)

CITIZENSHIP

Effect of Savings Clause of Immigration and Nationality Act Upon Derivative Status of Illegitimate Child. Espindola v. Barber, (N.D. Calif., May 29, 1957). Action under section 360 of Immigration and Nationality Act to determine citizenship.

Plaintiff in this case was ordered deported as an alien, and instituted this action alleging that he was in fact a citizen of the United States. He is the illegitimate son of a woman who became a naturalized citizen of this country on March 7, 1950, when plaintiff was fourteen years of age. Plaintiff was born in Mexico and his father, an alien, never married his mother. The latter has had sole and exclusive custody over plaintiff since his birth. Plaintiff and his mother were lawfully admitted to the United States for permanent residence in 1943. In 1955, plaintiff was adjudged to be a narcotic drug addict and was ordered deported on that ground.

The principal issue in the case was whether plaintiff acquired derivative citizenship by virtue of the naturalization of his mother in 1950. The Court observed that under the provisions of the Immigration and Nationality Act of 1952 he could have derived citizenship under the circumstances in his case. But since his mother's naturalization occurred prior to the effective date of the 1952 Act, the question presented was whether he had a "status" which was preserved to him by the savings clause of the 1952 Act and which would thus permit him to claim derivative citizenship under the Nationality Act of 1940.

The Court pointed out that under the 1940 Act a child born out of wedlock, and never legitimated, could not derive citizenship from the

naturalization of either his father or mother. The legislative history of the 1952 Act indicates clearly, however, that Congress intended to, and did, change the law in 1952, and did not intend, by the Act of that year, merely to restate what it thought the prior law had been. The Court observed that while the savings clause of the 1952 Act has generally been applied to preserve rights which could have been acquired under the prior law by an alien or citizen, but which were no longer made available under the 1952 Act, the Court was of the opinion that the language of the savings clause is broad enough to apply as well when the Government is relying on the provision. This plaintiff, prior to the 1952 Act, had the "status" or "condition" of an alien not eligible to claim derivative citizenship and the savings clause of the 1952 Act could not operate to affect that "status" or "condition".

Judgment for the defendant.

* * *

OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

"Resident Within" Under Trading with the Enemy Act. Willenbrock v. Brownell (E.D. Pa., May 28, 1957). Plaintiff sued under Section 9(a) of the Act. At the trial before Kirkpatrick, Ch. J., the evidence showed that plaintiff came to the United States from Germany in 1908 and was naturalized in 1928. In 1932 she went to Germany to take care of her aged father, who died in 1933. He left an estate consisting of a small amount of money and a building in Bremen, which had a restaurant on the ground floor and an apartment above. Plaintiff remained in Germany to settle the estate and collected the rent from the restaurant and lived in the apartment. In 1936 she bought out the other heirs. Except for an eight-month visit to the United States in 1934-1935, she remained in Germany until 1949. The restaurant rent was sufficient for her to live on without seeking employment.

The Court found that plaintiff did not attempt to push the sale of the real estate, but that she did intend to return to the United States when she had made satisfactory arrangements about the property. It also found she intended to retain her American citizenship and did not intend to remain permanently in Germany. It held for plaintiff on the authority of Nagano v. McGrath, 187 F. 2d 759 (C.A. 7), affirmed by an equally divided Court, 342 U.S. 916, saying that the word "resident" in the definition of "enemy" meant something closer to domicile than to mere physical presence. The Court did not mention Guessefeldt v. McGrath, 342 U.S. 308, in which the Supreme Court said that "resident" means something less than domicile but more than mere physical presence, nor cases like Ecker v. Atlantic Refining Co., 222 F. 2d 618 (C.A. 4), certiorari denied, 350 U.S. 847, which held that the intention necessary to become a "resident" was to remain in a place "for the time being".

In a companion proceeding the Court denied a motion by Miss Willenbrock under Rule 60(b) to set aside an order entered in 1950 which nullified her certificate of naturalization issued in 1928. She had been naturalized a second time in 1955.

Staff: The case was tried by Westley W. Silvian and Thomas J. Brennan (Office of Alien Property), assisted by Assistant United States Attorney Joseph L. McGlynn, Jr. (E.D. Pa.)

Intervening Stockholders Representing 15% of I.G. Chemie capital stock may not enjoin Attorney General from selling 75% of General Aniline & Film Corporation stock vested from I.G. Chemie. Kaufman, et al. v. Brownell (C.A. D.C. June 20, 1957). On April 11, 1957, the Court of Appeals affirmed the order entered by the district court on the mandate of the Court of Appeals dismissing I.G. Chemie's suit for return of approximately 93% of the vested stock in General Aniline & Film Corporation. The stock is estimated to be worth over $100,000,000. See U.S.

Attorneys Bulletin, Vol. 5, No. 9, p. 274. Suits are still pending in the District Court by some 1,700 stockholders of I.G. Chemie, who were permitted by the Supreme Court's decision in Kaufman v. Societe Internationale, 343 U.S. 156 (1952), to intervene in the main action to assert their claims to a proportionate share of the vested assets.

On March 15, 1957, the district court entered an order denying intervenors' motions to enjoin the Attorney General from proceeding with the publicly announced sale of 75% of the General Aniline stock claimed by I.G. Chemie. In denying the motions, Judge Pine held that whether the theory of the complaints in intervention be deemed to be derivative or individual claims, intervenors' rights are limited to an interest in the assets proportionate to their stockholdings. Finding that intervenors represent only 15% of Chemie's capital stock at vesting in 1942, the district court ruled that intervenors' maximum recovery could not exceed 25% of the Chemie-claimed GAF stock and that the Attorney General therefore could lawfully sell 75% of the stock. See U.S. Attorneys Bulletin, Vol. 5, No. 7, p. 209.

On appeal, intervenors contended that the district court misconstrued the Supreme Court's decision in Kaufman v. Societe Internationale, supra. They argued that the Supreme Court had permitted them to intervene to assert a derivative corporate claim on behalf of all nonenemy stockholders, whether or not they had intervened, and that the Government must return to them that part of the vested assets corresponding to the nonenemy stock interest in Chemie at vesting. This interest, they claim, ultimately may be shown to exceed 80% of the vested property. Intervenors also argued that the district court erred in finding that under no circumstances could their interests exceed the 25% of the stock which the Attorney General planned to retain to satisfy their claims.

In affirming the denial of the motions for injunction, the Court of Appeals upheld the Government's position that under the Kaufman decision the intervening stockholders may recover only their own proportionate share of the vested assets. The Court noted that in Kaufman the Supreme Court had "cut through" the corporate veil and allowed -- in Chemie's corporate action -- the "nonenemy stockholder in his own right to . . . assert his nonenemy character in order to protect his own interest from the enemy taint caused by other stockholders". The problem of a corporate recovery no longer concerned the Court "for the corporation's suit has been dismissed". Thus, the Court concluded that each innocent nonenemy stockholder, permitted to intervene in the corporate suit, has, in the words of the Supreme Court, a "severable interest in corporate assets seized by the Custodian . . .". Since the interventions are suits under Section 9(a) of the Trading with the Enemy Act, the Court held that an intervening, nonenemy stockholder may recover only the property or interest to which the claimant is entitled, "not the property or interest therein of some other claimant, or even of all claimants similarly situated". The Court ruled, moreover, that the District Court did not abuse its discretion or err in finding that the interests of the intervening groups could not exceed the 25% of the Chemie-claimed GAF stock to be retained, and that such interests amounted to only 15% of the capital stock of Chemie at the date of vesting.

Staff: The appeal was argued by David Schwartz. With him on the brief were George B. Searls, Sidney B. Jacoby, Paul E. McGraw, Ernest S. Carsten (Office of Alien Property)

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