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UNITED STATES ATTORNEYS

BULLETIN

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UNITED STATES ATTORNEYS BULLETIN

Vol. 6 January 31, 1958 No. 3

BAIL AFTER CONVICTION

Distributed with this issue of the Bulletin are copies of a memorandum on "Bail After Conviction" which United States Attorneys and their staffs should find most informative. Attention is directed to the fact that the possible changes suggested at the end of the memorandum are for the guidance and consideration of the United States Attorneys and have not yet been put into official effect.

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DISTRICTS IN CURRENT STATUS

As of November 30, 1957, the total number of districts meeting the standards of currency were:

CASES				MATTERS			
Criminal	change from 10/31/57	Civil	change from 10/31/57	Criminal	change from 10/31/57	Civil	change from 10/31/57
66	-12	54	-4	51	+6	70	-8
70.2%	-12.7%	57.4%	-4.3%	54.2%	+6.4%	74.4%	-8.5%

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OATH OF OFFICE

United States Attorneys are reminded that the oath of office is to be executed and submitted on Standard Form 61, revised March, 1956. The old form should not be used.

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MODIFICATIONS IN LITIGATION REPORTING SYSTEM

As of December 31, 1957, the revised reporting system using IBM "mark-sense" cards and "snap-out" docket cards was in operation in a total of 40 offices.

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CERTIFICATES OF AWARD PRESENTATION

The presentation of certificates of award to two employees in the office of United States Attorney Ruben Rodriguez-Antongiorgi, District of Puerto Rico, received an interesting write-up in El Mundo

the leading paper of Puerto Rico. Miss Magdalena Geigel received an award for twenty-five years of service with the Department of Justice, and Mr. Angel Casasus was similarly honored for fifteen years of service. Mr. Rodriguez-Antongiorgi pointed out that such awards are part of the program of the Department of Justice for recognition of outstanding service, and that the publicity given them serves as an incentive and example to Federal employees not only in the Department but also in other Federal agencies.

* * *

JOB WELL DONE

In a recent case involving the interstate shipment of food unfit for human consumption, Assistant United States Attorney A.M. Gant, Jr., Middle District of Tennessee, was congratulated on his success by the District Chief, Food and Drug Administration, who expressed appreciation for Mr. Gant's painstaking preparation and the excellent job he did in a highly technical and difficult field.

The Associate General Counsel, Department of Health, Education and Welfare, has expressed thanks for the cooperation of United States Attorney Fred W. Kaess and Assistant United States Attorney Horace J. Rodgers, Eastern District of Michigan, in obtaining judgment for the Government in a recent case. The letter stated that the outcome of the case was important since it involved a rather complicated question as to the Congressional intent in enacting a certain amendment of the Social Security Act and the effect of that amendment upon other provisions of the Act.

In a letter to United States Attorney Harold K. Wood, Eastern District of Pennsylvania, commenting on the results of the last term of criminal court, the Chief Judge of the District Court stated that the results were most gratifying and that the good record was in a very substantial part due to Mr. Wood's efficient conduct of his office.

The expeditious and competent handling of land condemnation work by Assistant United States Attorneys Charles W. Ward and Addison I. West, District of Kansas, has been commended by the District Engineer, Corps of Engineers. Both Assistants have devoted considerable hard work to keeping abreast of the condemnation program. In a recent case Mr. West saved the Government time and money by his urgent and diplomatic handling of the matter involved. By prompt pleading and the obtaining of an early court hearing, the contractor on a Government project was permitted to proceed with his work, thus eliminating loss of time and considerable expense.

The Federal Game Warden for Nebraska has commended the untiring efforts and hard work of Assistant United States Attorneys Byron D. Strattan and Dean W. Wallace, District of Nebraska, in bringing a recent case to a successful conclusion. The Federal Game Warden observed that

they made a perfect presentation of the case, which aroused a considerable amount of interest as it involved one of the most widely known trapshooters and hunters in the state.

The outstanding cooperation and good work of Assistant United States Attorney William F. Davis, Eastern District of Virginia, in two recent cases involving two alien smugglers has been commended by the Acting Regional Commissioner, Immigration and Naturalization Service. The letter pointed out that the defendants caused the Government considerable trouble and expense in connection with their prosecution because, after the witnesses had left the country, the defendants repudiated their agreement to waive trial and plead guilty under Rule 20, Federal Rules of Criminal Procedure. It further stated that had it not been for Mr. Davis' able prosecution and hard work in the case, the defendants would have evaded punishment. It appears that every phase of the case had to be handled through interpreters since neither defendant could speak or understand English, and successful prosecution could easily have been hampered by this complication, as both cases were tried before a jury.

The Special Agent in charge, United States Department of State, Division of Security and Investigations, New York, has commended the work of Assistant United States Attorney Margaret Millus, Eastern District of New York, with regard to Chinese civil suits. The letter stated a recent survey showed that in the past six months three cases have been won, seven have been discontinued, and an additional discontinuance is pending, and that these results have been obtained mainly through the outstanding efforts of Miss Millus. The letter further stated that the attitude with which she has prepared her cases and her lawyer-like presentation of suits which are admittedly difficult to defend are most commendable, and that the Special Agents of the Office of Security who have worked with her have reported that Miss Millus is cooperative, cordial, and an outstanding representative of the Office of the United States Attorney.

The excellent results obtained by United States Attorney Fred W. Kaess and Chief Assistant United States Attorney George E. Woods, Eastern District of Michigan, in a recent case involving a mail and telephone promotion from Canada into the United States have been commended by the General Counsel, Securities and Exchange Commission. The letter stated that the pleas entered and the sentences imposed would not have been possible had it not been for the aggressive, vigorous and able manner in which Messrs. Kaess and Wood handled this case. The letter further observed that their effective cooperation from the very inception of the case made it possible to successfully meet and overcome the many difficult problems which arose during the lengthy period the case was being prosecuted against the defendants.

The Associate General Counsel, Department of Health, Education and Welfare, has expressed appreciation for the cooperation extended by United States Attorney Chester A. Weidenburner, District of New Jersey, and his staff in obtaining a favorable decision in a recent case against the Government.

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INTERNAL SECURITY DIVISION

Assistant Attorney General William F. Tompkins

Conspiracy to Obstruct Justice; Perjury. United States v. Lawrence Siegel and Hadassah Shapiro (S.D. N.Y.) A Federal grand jury in New York returned a twelve count indictment on July 13, 1955 charging Lawrence Siegel and Hadassah Shapiro with violations of 18, U.S.C., 371, 1503 and 1621. The indictment alleged that they committed perjury in their testimony before the grand jury investigating the recantations of Harvey Matusow and that they destroyed memoranda relating to conversations they had with Matusow and substituted therefor false and fraudulent memoranda. The indictment also charged that Siegel and Shapiro corruptly influenced the testimony of a witness who testified before the grand jury. Trial was commenced on December 16, 1957, and on January 18, 1958 the jury returned a verdict of guilty on nine counts and acquittal on three counts. Defendant Siegel was convicted on all four counts charging him with perjury and defendant Shapiro was convicted on the two counts charging her with perjury. Both defendants were convicted on three of the four counts charging obstruction of justice and acquitted on one count. Both were acquitted as to counts 1 and 2 charging them with conspiracy to obstruct justice and with corruptly influencing the testimony of a witness. Motions for a new trial were denied with leave to file written motions by February 10, 1958. It is anticipated that sentences will be imposed on that date.

Staff: Assistant United States Attorneys Arthur B. Kramer and Foster Bam (S.D. N.Y.)

Federal Employees Security Program. Sue J. Sampson v. Wilber Brucker, et al. (D.C.) Plaintiff served a summons and complaint upon the Attorney General on October 4, 1957, seeking to have the action of defendant Wilber Brucker in terminating plaintiff's employment with the Department of the Army and the action of defendants Ellsworth, Phillips and Lawton in refusing and denying her petition for appeal from the adverse decisions of defendant Brucker declared null and void. Plaintiff also seeks reinstatement and restoration to her former position with the Department of the Army with full "back pay" and for such other relief as the Court may deem proper. Plaintiff was advised by the Office of the Secretary of the Army on April 20, 1954 that her continued employment in Indianapolis, Indiana was not clearly consistent with the interest of national security and therefore her removal was necessary and advisable under authority granted by Public Law 733, 81st Congress, 64 Stat. 476, 5 U.S.C. 22-1. Plaintiff, a civil service appointee who occupied a "non-sensitive" position, places her main reliance on the decision of the U.S. Supreme Court in the matter of Cole v. Young, 351 U.S. 536. The government filed its answer on November 26, 1957. On December 3, 1957 the Government filed a Motion for Security for Costs inasmuch as the plaintiff is a nonresident of the District of Columbia. This motion was granted and the plaintiff was ordered to furnish within twenty days

security for costs (in the amount of $50.00 cash, or $100.00 bond.) Inasmuch as plaintiff did not comply with the Court Order, her cause was dismissed by order of the Court dated January 21, 1958.

Staff: James T. Devine and Herbert E. Bates (Internal Security Division)

Suits Against the Government. Corliss Lamont v. John Foster Dulles (D.C.) On June 18, 1957, a complaint was filed praying that the Court find that plaintiff is entitled to a passport. The complaint also sought to enjoin defendant from continuing to refuse to grant a passport to plaintiff because he refused to answer questions contained in the application form concerning present and past membership in the Communist Party. Plaintiff based his refusal to answer these questions on the ground that it was unconstitutional for the Secretary to ask questions of this type and to require answers. On November 4, 1957, plaintiff served a notice of deposition of the defendant and Frances G. Knight, Director of the Passport Office, for the purpose of inquiring, inter alia, whether the State Department had any information in its files or otherwise that plaintiff was a member of the Communist Party or that he was such a member at the time this complaint was filed. A motion to quash the taking of depositions was granted on December 18, 1957. On January 21, 1958, Judge Richmond B. Keech signed an Order granting defendant's motion for summary judgment and dismissing this action.

Staff: James T. Devine and Donald S. Smith (Internal Security Division)

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURT OF APPEALS

DEFAMATION

Absolute Privilege; Naval Officer Denied Defense of Absolute Immunity from Liability in Defamation With Respect to Official Communication to Members of Congress. Kenneth T. Lyons v. W. E. Howard, Jr. (C.A. 1, January 13, 1958). Two civilian employees of the Boston Naval Shipyard brought a libel suit against the commanding officer of the shipyard on account of defamatory matters pertaining to them contained in an official communication written by the commander to his superior officer, copies of which were sent to members of the Massachusetts congressional delegation because of their official interest in the matters under discussion. The district court granted the defendant's motion for summary judgment, sustaining his defense of absolute privilege on the ground that the statements attributed to him were made in the discharge of official duties and in relation to matters committed to his control and supervision. The Court of Appeals (one judge dissenting) reversed, holding that, while defendant was protected by an absolute immunity from civil liability with respect to the official report to his superior officer, this cloak of immunity did not extend to communication of the report to the Massachusetts congressional delegation. With respect to the latter publication, the Court held that defendant was entitled to a qualified or conditional privilege only, requiring him to satisfy a jury at a trial that his action was taken in good faith. This would be required despite the uncontroverted fact that included among defendant's official duties was the duty of keeping members of Congress informed as to matters occurring within his command in which they had an official interest. This factor was the basis of the dissent of Judge Woodbury, who stressed the importance of not discouraging military officers from freely giving information to members of Congress as to matters pertinent to the latters' legislative duties and functions.

Staff: Paul A. Sweeney and Bernard Cedarbaum (Civil Division)

FEDERAL TORT CLAIMS ACT

National Guardsman, Not Called Into Active Federal Service, Is Not Employee of United States Within Meaning of Tort Claims Act. Storer Broadcasting Company, Detroit Fire & Marine Insurance Company and Associated Aviation Underwriters v. United States (C.A. 5, January 9, 1958). Plaintiff brought suit against the United States seeking to recover approximately $100,000 for property damages sustained as a result of the negligence of a member of the Air National Guard of the State of Alabama while he was on a training flight for the Alabama Air National Guard. The loss occurred when an Alabama Air National Guard plane skidded off the runway at Birmingham Municipal Airport while landing and collided with Storer Broadcasting Company's plane which was

parked about 100 feet from the landing strip. Neither the pilot of the military plane nor the Alabama Air National Guard were in active federal service at the time of the accident. The district court, after a trial on the merits, entered judgment for the United States. The Court of Appeals affirmed. Relying on three earlier Fifth Circuit cases directly in point, as well as on numerous other federal and state cases, it held that a member of a state national guard, who is not a caretaker, and who has not been called to active service of the United States, is not an employee of the United States within the meaning of the Federal Tort Claims Act.

Staff: Peter H. Schiff (Civil Division)

United States Held Not Liable for Furnishing Vehicles to State National Guard Which Did Not Conform to State Standards. United States v. Mable Prager, Independent Executrix of Estate of Myron Prager, Deceased, and Mary Mason Burroughs, Independent Executrix of Estate of William C. Snow, Deceased (C.A. 5, January 9, 1957). Plaintiffs' decedents were killed when their automobile ran into a parked antiaircraft gun being towed by a truck operated by a member of the New Mexico National Guard who was returning from a two week's summer training encampment. In actions for damages, the district court entered judgments against the United States aggregating $100,000. The Court of Appeals reversed. As in the Storer Broadcasting Company case, supra, it held that the United States is not liable under the Tort Claims Act for the negligent acts or omissions of members of a state national guard not in the active service of the United States. The Court also rejected the further claim of plaintiffs that the United States was liable because it negligently furnished vehicles to the State National Guard without equipping them with the flares and lighting equipment specified by state statutes. It held that the operation of the improperly equipped vehicles, not the original furnishing of the vehicles, was the proximate cause of the deaths.

Staff: United States Attorney Russell B. Wine; Assistant United States Attorneys Holvey Williams and William Monroe Kerr (W.D. Tex.)

District Court's Reliance on Inferences from Physical Evidence Held Not Clearly Erroneous. James Elam v. United States (C.A. 6, January 3, 1958). This action was brought to recover for personal injuries suffered by plaintiff when he was struck by a mail truck. The district court held for the United States on the ground that plaintiff had failed to prove by a preponderance of the evidence that he was injured as a result of the truck driver's negligence. As to the circumstances surrounding the collision, there was a conflict in both the testimonial and physical evidence. The Court of Appeals affirmed, holding, inter alia, that it could not say that the findings and conclusions of the trial judge were clearly erroneous even though he placed considerable reliance

upon the inferences drawn from the physical evidence which were contrary to much of the testimonial evidence favorable to the plaintiff.

Staff: United States Attorney Hugh K. Martin; Assistant United States Attorneys Thomas Stueve and James E. Appelegate (S.D. Ohio)

PRODUCTION OF DOCUMENTS

District Court's Refusal to Compel Compliance With Subpoena Duces Tecum Upheld. Simon E. Jackson v. Allen Industries, Inc. (C.A. 6, January 2, 1958). Plaintiff sued defendant company for wrongful discharge and interference with his employment and attempts to secure employment. The principal question presented on appeal was whether the district court erred in refusing to compel obedience to a subpoena duces tecum served on behalf of plaintiff upon the special agent in charge of the Detroit Field Office of the FBI seeking production in court of certain FBI documents and records. The special agent declined to produce the documents and records subpoenaed upon the ground that the Attorney General had determined under Department of Justice Order 3229 to claim privilege as to the papers covered by the subpoena. The United States Attorney was instructed by the Attorney General to present this claim of privilege to the district court. The Court of Appeals held that the refusal of the district court to compel compliance with the subpoena was correct.

Staff: United States Attorney Fred W. Kaess and Assistant United States Attorney George E. Woods (E.D. Mich.)

SOCIAL SECURITY ACT

Limited Scope of Judicial Review in Proceedings Under Social Security Act; Administrative Determination Must Be Upheld If Findings Are Supported by Substantial Evidence. Marion B. Folsom, Secretary of Health, Education and Welfare v. Hugh W. O'Neal (C.A. 10, December 28, 1957). Appellee filed a claim with the Social Security Administration for old-age insurance benefits, alleging entitlement thereto on the basis of his having been employed by his sister at her hotel for the required period of time (18 months) under the Social Security Act. A referee found, after hearing, that claimant had come to live at the hotel as a member of his sister's family and in that capacity had helped out around the hotel from time to time; that until October 1, 1952, he received no pay for such services and, although he received $300 per month for his services from October 1, 1952 until April 1, 1954 (exactly 18 months), his duties were no different than they had been before. The referee further found that, after payments were discontinued, claimant continued to live at the hotel and performed the same duties. The referee concluded that a bona fide employment relationship had not existed between claimant and his sister and that "such sums of money as were given the claimant were given to him by a sister who wished to help out

and more specifically for the purpose of building a wage record to enable the claimant to qualify for monthly benefits."

Claimant then brought suit in the district court. On cross-motions for summary judgment, the district court granted claimant's motion and denied the Government's. No opinion was filed by that court; its judgment stated merely "* * * that the motion for summary judgment by the plaintiff should be sustained for the reason that under the facts found in this matter by the Referee, * * * as a matter of law the plaintiff was employed" by his sister for the required period of time.

The Court of Appeals reversed. It stated that, in actions of this type, the factual findings of the Administrator are conclusive upon the court if supported by substantial evidence (§205(g)) of the Social Security Act, 42 U.S.C. 405(g)) and that the conclusive effect of such findings also extends to inferences reasonably drawn therefrom. See Ferenz v. Folsom, 237 F.2d 46 (C.A. 3), certiorari denied, 352 U.S. 1006; Rosewall v. Folsom, 239 F.2d 724 (C.A. 7). The Court held that the administrative determination that appellee was not a bona fide employee of his sister was adequately supported by the evidence and that such determination should not have been disturbed by the lower court.

Staff: Seymour Farber (Civil Division)

DISTRICT COURT

ADMIRALTY

Coast Guard Aid to Navigation Held Within Provisions of Rivers and Harbors Act. United States v. M/V Vitanic, et al., (W.D. Wash., December 16, 1957). The M/V VITANIC collided with and damaged a 3-pile structure and light established, maintained, and operated by the Coast Guard to mark the navigable channel in Wrangell Narrows, Alaska. The light was shown on the Coast and Geodetic Survey chart of the channel and in the Light List. The United States filed a libel against the vessel in rem under the Rivers and Harbors Act, 33 U.S.C. 408, 412, for the damages and penalty and in personam against the owner pro hac vice for the damages due to the negligence of those in charge of the vessel.

Defense was based on the lack of negligence and a contention that the Rivers and Harbors Act did not apply to an aid to navigation established, maintained, and operated by the Coast Guard. Respondents contended that, due to the proviso to 33 U.S.C. 408, the Act covered only structures established, maintained and operated by the Corps of Engineers, while Coast Guard-maintained structures were protected only by 14 U.S.C. 84. It was also argued that the Rivers and Harbors Act did not apply because, under 33 U.S.C. 412, recovery of the damages under that Act must be " . . . placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred," whereas 14 U.S.C. 642 provides for the payment to the Coast Guard of the cost of repair or replacement of the damaged aid to navigation, after which the Commandant may deposit such payment in a special account to

pay either the contract repairer or, if the Coast Guard repairs the aid, to reimburse the appropriation which bore that cost.

The Court held that such an aid to navigation was an "established mark" under the Rivers and Harbors Act, 33 U.S.C. 408, and assessed penalty and damages thereunder against the vessel. Though such recovery may, under the Act, be made regardless of negligence, the Court found negligence on the part of the owner pro hac vice and ordered judgment for the damages alone against that party as well.

Staff: Assistant United States Attorney Jacob A. Mikkelborg (W.D. Wash.), John F. Meadows (Civil Division)

GOVERNMENT EMPLOYEES

Employee Discharged on Grounds of Medical Unfitness for Duty and Inefficient Work Performance Should Have Been Retired for Disability, if Otherwise Qualified, Rather Than Removed for Cause. Juanita Kennedy Morgan v. George M. Humphrey et al. (D.C., December 13, 1957). Plaintiff, an employee with the Bureau of Engraving and Printing with over thirteen years in the classified civil service, was removed from her position effective December 31, 1954, pursuant to 5 U.S.C. 652(a) and Part 9 of the Civil Service Commission Regulations on the grounds of (1) medical unfitness for duty, and (2) inefficient work performance. The Bureau had prepared disability papers for the plaintiff but she refused to apply for retirement. The Bureau told her it would not make the application for her and did not further process the retirement papers but removed her from her position to "promote the efficiency of the service."

At the trial on plaintiff's suit for reinstatement to one of two positions with the Bureau of Engraving and Printing, the court sua sponte declared that, where plaintiff had been discharged on two grounds, one of which included disability, she should not have been discharged but rather retired for disability, regardless of whether she had applied for retirement since 5 U.S.C. 710 provided that such retirement could be effected "upon the request or order of the head of the department, branch, or independent office concerned". Judge Holtzoff thereupon ordered that plaintiff be placed on the retirement rolls commencing as of the date of her separation from employment with adjustments to be made for the refund of contributions paid to the plaintiff.

Staff: United States Attorney Oliver Gasch; Assistant United States Attorney Robert J. Asman (D. of Col.); Andrew P. Vance (Civil Division)

RENEGOTIATION

Transferee Liability of Officer Who Liquidated Corporation Without Paying Debts Due United States. United States v. Benjamin Stratmore (D. N.J., December 20, 1957). Defendant borrowed $480,000 which he used

to purchase all the stock of Wadell Engineering Company. He then borrowed $532,000 from Wadell Engineering to repay his loan. While he was president of Wadell, the company was liquidated and he became its liquidating trustee. He did not repay any part of his $532,000 loan.

At the time of its liquidation, the company owed the United States $35,868.32 plus interest as the result of renegotiation for the year ended June 30, 1944. This liability was reduced to judgment in 1952, but no part of it was ever paid. At the time of liquidation, the company also had a renegotiation liability in an undertermined amount for the year ended June 30, 1946. In 1948, this amount was determined to be $21,355.81.

During Wadell's liquidation, its assets were sold for $47,000 of which $40,000 went to pay trade creditors, the remainder going for taxes and liquidation expenses. The Government sued defendant asserting a transferee liability based on 31 U.S.C. 191 and 192, and on New Jersey Revised Statutes, Title 14: 8-10, which provides that, if a corporation lends money to a stockholder or officer thereof, the officers who make it or assent to it are liable to the extent of the loan and interest for all debts of the corporation until repayment of the sum so loaned. The Court granted judgment against him under 31 U.S.C. 192 in the amount of the 1944 liability and under the New Jersey statute in the amount of the 1946 liability. The judgment, which included interest, was in the total amount of $92,366.28.

The case is of interest in that it holds that bankruptcy or receivership proceedings of a corporation are not a prerequisite to the incurring of transferee liability by its officers under 31 U.S.C. 191-2.

Staff: United States Attorney Chester A. Weidenburner; Assistant United States Attorney Charles A. Hoens, Jr.; Arthur H. Fribourg (Civil Division).

UNITED STATES MARSHALS

United States Marshal Has Authority to Execute Bench Warrant in His District Although Warrant Issued to United States Marshal in Another District. Angus M. MacNeil v. Ralph W. Gray (D. Mass., December 27, 1957). The defendant in this case, the United States Marshal for the District of Massachusetts, was sued for having committed the tort of false arrest or the tort of abuse of process. Plaintiff had been adjudged guilty of criminal contempt by the United States District Court for the District of New Hampshire and that Court issued to the United States Marshal for the District of New Hampshire a bench warrant for his arrest. The New Hampshire Marshal mailed the warrant to the Massachusetts Marshal, who caused one of his deputies to arrest plaintiff in the corridor of the Massachusetts District Court House for the District of Somerville. The deputy thereafter conveyed plaintiff to Concord, New Hampshire, where he surrendered him to the New Hampshire Marshal. Plaintiff asserted in this suit that the Massachusetts Marshal had no authority to arrest him because (1) he had no valid process, (2) plaintiff was immune from service while he was in the state court house where

he was appearing both as a lawyer and as a witness, and (3) that, after his arrest, the deputy should have taken him before a United States Commissioner in Boston. In granting the Government's motion for summary judgment, United States District Judge Wyzanski held that: (1) As the warrant was issued in a criminal case, Massachusetts' Marshal Gray had double authority to execute it under 28 U.S.C. 547(b). "First, he was commanded by the New Hampshire Marshal to assist him in executing in Massachusetts the bench warrant directed to him. Second, quite apart from that command, Mr. Gray had independent authority to execute the precept as one issued under the authority of the United States, even though it was not directed to him personally." (2) "A person is not immune from arrest on a criminal process on the ground that he is a witness, party or lawyer attending a civil case." (3) "When a person had been adjudicated a criminal and his attendance is required for further proceedings, he may be arrested pursuant to a bench warrant. There is no occasion to bring him before a commissioner, and there is nothing for a commissioner to hear or decide. Rule 5(a) of the Federal Rules of Criminal Procedure, governing arrest on a complaint and before trial, is patently inapplicable."

Staff: United States Attorney Anthony Julian and Assistant United States Attorney George C. Caner, Jr. (D. Mass.)

INTERSTATE COMMERCE COMMISSION

RAILROADS

Declaratory Order; Railway's Petition for Determination as to Which No Suit Has Been Brought in District Court Denied. Petition of Northern Pacific Railway Company, Docket No. 32197 (December 9, 1957). Northern Pacific Railway Company, on June 24, 1957, petitioned the Interstate Commerce Commission for a declaratory order under Section 5(d) of the Administrative Procedure Act, 5 U.S.C. 1004(d), determining the applicable charges on 15 carloads of ammunition shipped by the government in 1950. The charges were paid on presentation of the bills but the General Accounting Office, acting under the authority of Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, subsequently deducted $10,918.54, claiming the railroad had been overpaid. The government moved to reject petitioner's statement of fact and argument on the ground that the Commission's authority is limited to complaints against carriers and it has no jurisdiction to hold a hearing on the complaint of a railroad seeking relief from a shipper. Nothing in the Administrative Procedure Act broadens the substantive rights of the parties as set out in existing statutes. It was conceded that a court might refer the matter to the Commission but no court action was pending. The Commission held that the railroad has an adequate remedy against the United States and therefore denied the petition for a declaratory order.

The decision is believed to have very wide significance. The railroads appear to be relegated in cases of this kind to actions in the district court or court of claims or to filing a claim for a refund with

the GAO. If court procedure is resorted to, the courts will not be faced with a prior decision of the Commission on the very matter at issue, though they could refer it for an advisory opinion in appropriate circumstances. Similarly, the GAO may act without the possible embarrassment of a contrary I.C.C. decision.

Staff: Arthur H. Fribourg (Civil Division)

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CRIMINAL DIVISION

Acting Assistant Attorney General Rufus D. McLean

BRIBERY

Criminal Intent. United States v. Charles V. Labovitz and Martin Abrams (C.A. 3). During the renegotiation of an Army surplus contract, a contracting corporation was permitted to make a supplemental showing of cost to support a reduction of the Government's claim for refund. Labovitz, the corporation president, acting in concert with Abrams, then offered money to a Government accountant for the purpose of inducing the latter to recommend to the contracting officer a reduction of the Government's claim. Labovitz and Abrams were convicted of bribery and conspiring to bribe a federal employee.

On appeal, Abrams, relying on United States v. Glazer, 129 F. Supp. 285 (D.C. Del., 1955), asserted that bribery under 18 U.S.C. 201 must be directed at the accomplishment of an unlawful act; therefore, since the accountant could have quite legally recommended the requested reduction without a bribe, no unlawful result was intended. In affirming the conviction, the Court of Appeals for the Third Circuit rejected this argument and interpreted the statute as proscribing alternative criminal intents. Thus it is a crime under Section 201 ". . . to offer money for any person acting for the United States 'with intent to influence his decision or action on any . . . matter . . . before him in his official capacity . . . or to induce him to do or omit to do any act in violation of his lawful duty . . .'"(emphasis added).

Questioning the interpretation of Glazer, the Court relied upon Daniels v. United States, 17 F. 2d 339 (C.A. 9, 1927), cert. den. 274 U.S. 744 (1926), and United States v. Schanerman, 150 F. 2d 941 (C.A. 3, 1945), which suggest that the basic rationale of the statute is to proscribe the improper influencing of official action whether right or wrong in order to insure the unbiased performance of official duties.

Staff: United States Attorney Harold K. Wood (E.D. Pa.)

BANKING

Misapplication; Fictitious Loans. United States v. Donald Richard George Jackson (S.D. Fla., December 17, 1957). Defendant, Vice President of Pan American Bank of Miami, Florida, was sentenced to three years' imprisonment, the sentences to run concurrently, on each of four counts of an information charging misapplication in the total amount of $90,000, in violation of 18 U.S.C. 656 (Federal Reserve Act). Defendant was arraigned on December 6, 1957, at which time he executed a waiver of indictment, and entered a plea of guilty to an information. He was sentenced on December 17, 1957.

Defendant's method of operation was to set up loan accounts in fictitious names, credit proceeds to checking accounts and withdraw funds by checks drawn in the fictitious names. He was caught when a routine check of collateral on installment loans on October 17, 1957, disclosed that the required collateral was not on file for a loan to one "J. H. Carter". Investigation disclosed that the address listed for "Carter" was fictitious. When the cancelled checks for the checking account carried in "Carter's name were brought to the cashier, he recognized the handwriting as that of defendant. Confronted with this information, defendant denied that there were any more fictitious loans, or that he was involved in any other irregularities, but further investigation turned up other fictitious loans. Defendant admitted these irregularities in a signed statement and also admitted misapplication of the proceeds of the sale of stock belonging to a bank customer.

Staff: United States Attorney James L. Guilmartin; Assistant United States Attorney O. B. Cline, Jr. (S.D. Fla.)

FRAUD

False Statement to Commodity Credit Corporation; Motion to Inspect Under Jencks Decision. De Casaus v. United States (C.A. 9, November 22, 1957). Appellant was found guilty by a jury of making a false statement to the Commodity Credit Corporation in violation of 15 U.S.C. 714m (a) in connection with the purchase of some 15,000 hundredweight of lima beans from that agency at a price below the domestic market price, the price being conditioned on export of the beans. Failure to export the beans rendered the Company liable to CCC for the difference between the price paid CCC and the domestic market price. At the trial evidence was introduced showing that large amounts of these beans had actually been sold domestically, and that Casaus Company supplied false documents purporting to evidence export thereof. The proof also showed that Kennedy, a special agent of the CCC, met with appellant and exhibited to him a paper stating that Casaus had received 15,417 hundredweight of CCC beans, whereupon Casaus stated that he had received all of them from CCC and had exported them.

On appeal Casaus claimed error in the trial court's refusal to allow him to make a search through voluminous records of the Department of Agriculture (amounting to some 50,000 documents) the issue being whether certain export documents had in fact been filed by defendant. Custodians of these records had testified that they had searched in vain for such records. Their testimony had been subjected to cross-examination. On two of the counts to which this motion referred, after the Court had ordered the production of the records for inspection the government dismissed, thus eliminating the issues as to these counts.

The majority opinion interpreted the motion as referring only to charges under these two counts which were dismissed. A concurring opinion interpreted a colloquy between the Court and counsel which occurred in a much later part of the trial as a motion for a similar inspection in connection with the remaining two counts, covering all documents filed

over a much longer period of time than that covered by the earlier motion. Answering what it construed as a claim of error by appellant in the refusal to permit inspection of these records on the basis of the Jencks decision, the concurring opinion noted that appellant was seeking inspection for discovery, not for cross-examination as in Jencks, and that discovery procedure remains regulated by Rules 16 and 17, F. R. Crim. P. The Court held that the refusal was reasonable under Rule 17, on a demand, in the midst of trial, for inspection of a mass of documents such that it would have necessitated a suspension of the trial, especially where the defendant made no showing that the search was likely to produce any specific documents.

De Casaus also contended that 15 U.S.C. 714m (a) had no application to statements made to investigative officers, which contention the Court rejected observing that arguments to this effect have been rejected in prosecutions under like statutes, citing Gilliland v. United States, 312 U.S. 86; Cohen v. United States, 201 F. 2d 386 (C.A. 9), cert. den., 345 U.S. 951; Marzani v. United States, 168 F. 2d 133 (C.A. D.C.).

EXPATRIATION

Making Formal Application to Government Agency for Reacquisition of Citizenship. Iwamoto v. Dulles (C.A. 9, December 10, 1957). In a suit for a declaratory judgment of American nationality the district court found that plaintiff had voluntarily expatriated himself by formally applying to the Japanese Ministry of Home Affairs for recovery of Japanese nationality against his contention that he was intimidated and coerced into making the application by the military police. Affirming the judgment, the Court of Appeals stated that while the issue was factual the act of making formal application to a government agency with the deliberate view of reacquisition of Japanese citizenship could be readily distinguished, if necessary, from voting in an election, marrying a foreigner or being drafted into a military organization. Apparently this language was included to take this case out of the category of expatriating acts now before the Supreme Court in Nishikawa v. Dulles, Perez v. Dulles and Trop v. Dulles.

Staff: United States Attorney Louis B. Blissard; Assistant United States Attorney Charles B. Dwight III (D. Hawaii).

* * *

TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS

Compromise Procedure

In tax collection cases generally, including bankruptcy and receivership cases in which the Government is asserting claims for taxes, United States Attorneys should, whenever feasible, include in all settlement negotiations the appropriate representatives of the Regional Counsel, Internal Revenue Service. To this end, copies of offers in compromise of cases of this type should be transmitted directly to Regional Counsel as soon as received by United States Attorneys, and Regional Counsel should be urged to forward their recommendations to the Chief Counsel without waiting for the latter to request them. This procedure also applies to offers in compromise of the Government's right of redemption originating in a tax lien on the property involved. The Chief Counsel has issued similar instructions to Regional Counsel. This item appeared in the May 11, 1956 issue of the Bulletin but is being re-issued here since this suggested procedure is not being followed in many cases.

Appellate Decision

Estoppel as Defense Where Taxpayer Signs Treasury Form 870-AD "Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment": F. R. Daugette, et al. v. Patterson (C.A. 5, December 26, 1957). Taxpayer filed an "Offer of Waiver of Restrictions On Assessments and Collection of Deficiency in Tax and of Acceptance of Overassessment" on Treasury Form 870-AD, whereby he offered to accept, as correct, assessments in the amount set forth therein, which were the same as had been determined by a settlement with conferees of the Internal Revenue Service. This offer was accepted by an Associate Chief of the Appellate Division of the Regional Commissioner's office. The Form 870-AD provided that "the case shall not be reopened nor shall any claim for refund be filed or prosecuted for the years in question in the absence of fraud, malfeasance, concealment or misrepresentation of material facts or of an important mistake in mathematical calculation." The assessments were made, the period of limitations for the further assessment of any tax for the years in question expired, and shortly thereafter taxpayer filed claims for refund of the amounts paid pursuant to the offers.

The Director asserted, as an affirmative defense in the suit following rejection of the claims, that the Commissioner had relied upon the offer to his detriment and that the taxpayer was estopped to assert the claims. The district court directed a verdict in favor of the Director on this ground. The Court of Appeals affirmed, holding that

Botany Worsted Mills v. United States, 278 U. S. 282, does not prevent the government from successfully interposing the doctrine of equitable estoppel against the repudiation by a taxpayer of his representations in an income tax matter. The Court noted that, when the offers were submitted, the statute of limitations with respect to the time for assessment of tax had not run against the government. When the claims for refund were filed and the suit was commenced, the statute had run and the government, relying upon the representations that no refund would be claimed and no suit to recover would be brought, lost its right to assess the originally proposed, larger deficiencies. The Court followed Guggenheim v. United States, 77 F. Supp. 186 (C. Cls.), certiorari denied, 335 U. S. 908, rehearing denied, 336 U. S. 911, and distinguished Joyce v. Gentsch, 141 F. 2d 891 (C. A. 6). The Court also rejected taxpayer's contentions that the defense of equitable estoppel should have been submitted to the jury, that the revenue agent had been guilty of malfeasance in procuring the execution of the offers, and that the question of malfeasance should also have been submitted to the jury.

A dissent was filed, stating that the majority holding is contrary to what the dissent felt was a legislative policy that there can be no compromise of a tax claim by the Commissioner except by means of a statutory closing agreement and that any relaxation of the requirements of Sections 3760 and 3761 of the 1939 Code or 7121 and 7122 of the 1954 Code is a matter for the consideration of Congress.

This issue is currently pending in the Court of Appeals for the Eighth Circuit, in Cain v. United States, argued November 18, 1957.

Staff: United States Attorney William L. Longshore (N.D. Ala.)
Sheldon I. Fink (Tax Division).

District Court Decisions

Tax Liens; United States Entitled to Foreclose on Taxpayer's Undivided One-Half Interest in Jointly Held Property. United States v. Ann M. Borcia, et al. (S.D. Calif., Oct. 16, 1957). The Commissioner assessed social security, cabaret and income taxes of about $200,000 against taxpayer for the years 1946-1948. The assessments were made on various dates beginning in January, 1948 through March, 1951, and notices of liens were filed in July, 1948, and November, 1951. This suit was filed to collect the tax liability and to foreclose the tax lien on taxpayer's interest in residence property in Los Angeles which had been acquired by her and her husband in 1947 as joint tenants. The property was subject to a deed of trust which had been executed and recorded in January, 1947. The City and County of Los Angeles had outstanding tax assessments against the property for various periods beginning in 1951 and ending in 1957.

The question presented was one of priority of liens on the property. The Court concluded that the interest of the taxpayer was that of a joint tenant with an undivided one-half interest held as separate property. Since it was impracticable and inequitable to sell

only the interest of the taxpayer, the Court ordered the entire property sold, and ordered disposition of the proceeds as follows: (1) Payment of Marshal's fees and expenses of sale; (2) payment of the balance due under the deed of trust; (3) the balance to be divided into two equal amounts, representing the interest of taxpayer and the interest of her husband; (4) the amount representing taxpayer's interest to be applied first on the federal tax assessments and interest thereon, then one-half of the city and county taxes, and any remaining balance to the taxpayer; (5) the amount representing the husband's interest to be applied in payment of one-half of the city and county taxes, and the remaining balance to the husband.

The Court specifically retained jurisdiction to grant a deficiency judgment to the United States for any tax liability remaining unpaid after disposition of the proceeds of sale of the property in accordance with its order.

Staff: United States Attorney Laughlin E. Waters, Assistant United States Attorney Robert H. Wyshak (S.D. Cal.), Robert Coe (Tax Division).

Tax Lien Held Prior to State Tax Lien. United States v. Industrial Commission of Wisconsin, et al. (W.D. Wis., Nov. 14, 1957). On March 4, 1954, the Commissioner assessed taxes against Television Service Engineers, Inc., and notices of the tax lien were filed on February 28, 1955. The Industrial Commission of Wisconsin issued and placed in the hands of the Sheriff a warrant for delinquent unemployment compensation taxes due from the same taxpayer. On March 7 and 8, 1955, the Sheriff, pursuant to that warrant, seized and sold property belonging to the taxpayer and the proceeds were deposited with the Court. The question was one of priority of liens on that fund.

The Industrial Commission contended that the federal taxes were not assessed in compliance with the Internal Revenue Code, that demand was not made upon the taxpayer, and that the lien of the United States was not specific and perfected and was invalid. The Court found that the United States made a valid assessment of taxes as evidenced by the following (Internal Revenue Service) records: The Unit Ledger Card, the Liability Sheet, the Summary Sheet, the Journal, and the Assessment Certificate (Form 23c) signed by the District Director on March 5, 1954; that demand was made upon the taxpayer, as shown by the Unit Ledger Card, on a Form 17 WE which was mailed to taxpayer's last known address as required by statute; that the tax lien acquired by the United States pursuant to the provisions of Sections 3670 and 3671 of the Internal Revenue Code of 1939, was a valid tax lien and not a mere inchoate lien or right to lien; and that the lien became enforceable as to judgment creditors on the date of filing. The Court found that the warrant issued by the Industrial Commission of Wisconsin and placed in the hands of the Sheriff was not docketed with the Circuit Court as required by state statute to give a lien upon real property.

The Court held that the United States was entitled to the fund in the hands of the Court, and to a deficiency judgment against the taxpayer for the remaining unpaid taxes.

Staff: United States Attorney George E. Rapp; Assistant United States Attorney John C. Fritschler, Jr. (W.D. Wis.); John J. McCarthy (Tax Division).

Motion to Intervene; Plaintiff's Motion to Intervene in Purported Class Action Denied Where Motion Was Made More Than Two Years After Rejection of Claim For Refund. Mollohan, et al. v. United States, (N.D. Ill., December 31, 1957.) On February 24, 1956, plaintiffs, husband and wife, pursuant to Rule 23(a)(3), F.R.C.P., instituted a timely purported class action "on behalf of themselves and all other employees or former employees of Illinois Bell Telephone Company similarly situated," seeking recovery of taxes alleged to have been erroneously paid upon sickness disability payments received by plaintiffs from their employer, contending that the payments were exempt from taxation under Section 22(b)(5) of the Internal Revenue Code of 1939. No objections were made to the filing of this class action nor to the timely interventions therein by other parties alleged to be "similarly situated" with the plaintiffs. On April 1, 1957, the Supreme Court, in Haynes v. United States, 353 U. S. 81, held that similar payments were exempt from taxation as "health insurance" under Section 22(b)(5) of the Code.

Subsequently, plaintiff, Bartels, moved to intervene in the class action on the ground that her interest and the class action (filed on behalf of a class of which she is a member) involve but a single question of law, common to both. It was alleged that during 1951, intervenor's deceased husband, an employee of the Illinois Bell Telephone Company, received sickness disability payments which were erroneously included in their gross income. On March 1, 1954, intervenor filed a timely claim for refund, rejection of which was duly made on February 7, 1955. Her motion to intervene in the class suit was filed on August 19, 1957, more than two years after rejection of her claim for refund.

Intervenor, conceding that the requirement for filing suit within two years after rejection of the claim for refund is jurisdictional and not a mere statute of limitations, contended that the filing of the class suit under Rule 23(a)(3) was commenced within the two year period and the commencement thereof satisfied the statute as to all members of the class on whose behalf it was brought, i.e., the date of filing of motion would relate back to the date of initial filing of the "class" action, which was instituted within two years after rejection of intervenor's claim.

In denying the motion to intervene, the District Court stated that "in a suit against the sovereign, the Court may not extend the terms under which the sovereign has consented to be sued. We are not concerned here with a statute of limitations, but with a substantive jurisdictional requirement."

Staff: Assistant United States Attorney Donald S. Lowitz, George Elias, Jr. (Tax Division).

CRIMINAL TAX MATTERS

Statute of Limitations on 1951 Tax Evasion Cases:

The statute of limitations in tax evasion cases based on the filing of false returns is usually computed from the receipt date stamped on the return by the District Director of Internal Revenue. The returns involved in a number of 1951 evasion cases are stamped with the date March 17, 1951. March 15, 1951, the latest filing date for that year, was a Saturday and in many instances these returns were actually received on this Saturday but were not stamped until the following Monday, March 17, 1951. In order to avoid arguments as to the running of the statute of limitations in cases based on returns stamped March 17, 1951, the indictments should be returned or, when necessary, the complaints filed on or before Saturday, March 15, 1958.

Appellate Decision

Conspiracy to Evade Assessment and Payment of Income Taxes; Validity of Indictment in View of Possible Use of "Tainted" Evidence. Lawn v. United States (Sup. Ct., January 13, 1958.) Howard Lawn, William Giglio, Frank Livorsi and others were charged in a 10-count indictment filed in 1953 with evading and conspiring to evade assessment and payment of individual and corporate income taxes for the year 1946 totalling some $800,000, on income earned in the post-war black market in sugar. After a six-weeks trial they were found guilty as charged. The Second Circuit affirmed. (See Bulletin, May 25, 1956, p. 364.) The Supreme Court affirmed the convictions, discussing in detail the petitioners' four major contentions: (1) that they should have been accorded a pre-trial hearing to ascertain whether there had been any use before the grand jury of evidence obtained from petitioners in 1952 in violation of their privilege against self-incrimination; (2) that they were denied due process of law in that they were given insufficient opportunity at the trial to determine whether any direct or derivative use was being made there of such evidence; (3) that Lawn's conviction should be reversed because the record clearly showed use at the trial of two documents secured from him in violation of his privilege; and (4) that there was insufficient evidence to sustain the convictions of Lawn and Livorsi.

(1) The Court upheld the District Court's denial of the pre-trial motion for a hearing, suppression of evidence, and dismissal of the indictment on constitutional grounds. The Court held (a) that petitioners had not made a showing of sufficient "solidity" (Nardone v. United States, 308 U.S. 338) to require such a hearing, but had relied mainly on mere suspicion; and (2) that even if "tainted" evidence had been used before the grand jury it would not have the effect of invalidating the indictment, citing Holt v. United States, 218 U.S. 245, 247, and quoting extensively from Costello v. United States, 350 U.S. 359, 363, 364.

(2) The Court found as a fact that there was no denial at the trial of the right to cross-examine for the purpose of ascertaining the source of evidence offered by the Government, and that the incidents relied upon by petitioners, when examined in their full context, related instead to the possible use of "tainted" evidence before the indicting grand jury.

(3) Although the Court was unanimous in its affirmance of the convictions of Giglio and Livorsi, it was divided (6-3) on Lawn's major contention, that receipt in evidence at the trial of photostatic copies of a $15,000 check paid to him by Giglio and Livorsi, and its corresponding stub, deprived him of due process. These documents had been obtained from Lawn in a 1952 grand jury proceeding in a manner which, it had earlier been held, infringed his Fifth Amendment privilege. They showed on their face, however, that they had been introduced at that proceeding. The Court held that Lawn's "able and experienced" trial counsel (Lloyd Paul Stryker) had waived any objection to the documents by allowing them to go into evidence after examining them and questioning the Government's witness about them. The dissenting Justices (Harlan, Frankfurter and Brennan) were of the opinion that the Court erred in regarding the waiver of objection as intentional (pointing out that the grand jury markings had also escaped the attention of the prosecutor), and favored a remand as to Lawn for the purpose of ascertaining the facts as to the Government's contention that it had had "untainted" copies of the same documents within reach, which could easily have been substituted if timely objection had been made.

(4) The Court found ample evidence to tie Lawn into the conspiracy and held that, since he was given concurrent sentences of only a year and a day (as contrasted to the 15-year sentences imposed on Giglio and Livorsi), there was no need to inquire into the propriety of his conviction on two substantive counts. Similarly, there was found sufficient evidence to support Livorsi's conviction on the conspiracy count and two substantive counts.

The Court relegated to a footnote a contention not raised in the Court of Appeals or in the petition for certiorari, but raised squarely in the trial court, viz., that defense counsel should have been furnished, for impeachment purposes, prior statements given to Treasury agents by a key Government witness. Jencks v. United States, 353 U.S. 657. The Court held that, not having been preserved, the "question is not properly here."

Staff: Roger D. Fisher (Solicitor General's Office)
Joseph F. Goetten, Joseph M. Howard, Richard B. Buhrman and Harlow M. Huckabee (Tax Division)

District Court Decisions

Statute of Limitations; Tolling by Complaint; Applicability of Section 3748(a), 1939 Internal Revenue Code, to Offenses Committed Prior to Effective Date of 1954 Code; "Absent from the District" Provisions of Section 3748, 1939 Code; Service of Summons After Filing of Complaint Under Rule 4(c)(3), Federal Rules of Criminal Procedure. United States v. Montgomery, et al., (E.D. Pa.) This case, involving the filing by the corporate-officer defendants of an allegedly false corporate income tax return, commenced with the filing of a complaint under the provisions of Section 3748(a), 1939 Code, on April 11, 1956, three days prior to the tolling of the offense by the six-year statute of limitations. Service of the summons issued pursuant to the complaint was thereafter made on a member of the firm of counsel for defendants under an informal agreement

between an Assistant United States Attorney and the member of the firm in question that service of the summons could be so accomplished. No summons was ever served on the named defendants themselves. The case was thereafter presented to the next grand jury and before its discharge and an indictment returned approximately 11 months after the complaint was filed. Defendants' motion to dismiss stated as grounds therefor (1) that Section 6531 of the 1954 Code is applicable to offenses committed prior to its effective date (August 17, 1954) but concerning which an indictment is not returned until subsequent to its effective date and, accordingly, the prosecution was barred since the indictment had been returned more than nine months after the filing of the complaint; and (2) that because of lack of proper service on the defendants, no valid complaint was "instituted" so as to extend the six-year period of limitations.

In an opinion filed on January 14, 1958, the District Court held that the provisions of Section 3748(a), 1939 Code, were applicable to offenses committed prior to the effective date of the 1954 Code and concerning which the indictment was not returned until after the effective date of the 1954 Code. Thus, "the grand jury at its next session" provisions of the 1939 Code were applicable to the case at bar and the indictment was timely returned. The Court thus refused to follow the rationale of United States v. Kleinman, 19 F.R.D. 423 (E.D. N.Y.).

The District Court did, however, dismiss the indictment on the defendants' second ground, i.e., that valid service of the summons had not been accomplished. In so ruling the District Court held that there is no substitute service provided for by Rule 4(c)(3), Federal Rules of Criminal Procedure, and the summons issued pursuant to a complaint must be served on a defendant "by delivering a copy to him personally, or leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address". The lack of compliance with the provisions of Rule 4 was held fatal, irrespective of any understanding or possible misunderstanding between counsel for the Government and counsel for the defendants.

The Government also contended that the statute of limitations was tolled because the defendants were absent from the district for a sufficient period under yet another provision of Section 3748, 1939 Code. The District Court declined to adopt this argument, relying on United States v. Beard, 118 F. Supp. 297 (D.C. Md.), which holds that the intent of Congress was not to include within those tolling provisions persons who did not absent themselves from the district but resided outside the district at all times.

The question of an appeal of the District Court's holding as regards service of summons is presently under consideration in the Department.

* * *

ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

Government Considering Possibility of Appeal from Order Transferring Case. United States v. Swift & Company, et al., (D. of Columbia). On January 9, 1958 Judge Charles F. McLaughlin ruled, in a memorandum opinion, that these proceedings should be transferred to the District Court in Chicago. The motion to transfer was argued December 12, 1957. The motion presented the novel question whether the transfer statute, §1404(a) of the Judicial Code, is applicable to proceedings in which a final judgment was entered prior to the passage of that statute. The government asserted in oral argument and in its extensive briefs that control of a valid decree entered by a court of competent jurisdiction remains with that court and none other and that §1404(a) does not authorize a transfer of post-judgment proceedings to a different court so as to permit the transferee court to modify or amend a decree of the transferor court. The government also contended that entry of the final judgment terminated the case and that §1404(a), while applicable to cases which were "pending" on the date of its passage, did not apply retroactively to cases already terminated.

Judge McLaughlin held that within the meaning of §1404(a) this was a "pending case" because of the continuing jurisdiction of the court over its decree and that the entry of the decree did not affect the power of the court under the transfer statute to transfer the case to Chicago.

This is the first ruling involving the applicability of the transfer statute in post-judgment proceedings and could have a material effect on all other cases in which a judgment was entered prior to passage of the transfer statute in 1948.

Staff: Harry N. Burgess and Alfred Karsted (Antitrust Division)

CLAYTON ACT

Motion For Summary Judgment Denied in Section 7 Case. United States v. Bethlehem Steel Corporation, et al., (S.D. N.Y.). On January 13, 1958 Judge Weinfeld filed an opinion denying the government's motion for summary judgment in the suit to enjoin the merger of Bethlehem Steel Corporation and the Youngstown Sheet and Tube Company as an alleged violation of Section 7 of the Clayton Act, as amended.

Judge Weinfeld stated that he did not reach "the classical summary judgment question of whether there is a genuine issue as to any material fact" but stated: "Upon further close study of the record, briefs and argument of counsel and considering the size of the industry, the vast amount of factual material to be analyzed and reviewed in reaching a decision, the multitude of problems in the case, the likely impact of a decision upon the iron and steel industry in particular, and upon the

economy of the country in general, and the admitted significance of a ruling under the amended Section 7 in view of differing contentions as to its construction. I am persuaded that a decision after trial will be the more desirable procedure in the matter. It will serve to bring into sharper focus certain issues of importance which have been obscured by the voluminous affidavits with their statements, counter-statements and alternative positions, and the conflicting conclusions which the parties contend are to be drawn from the multitude of facts and statistics presented."

Judge Weinfeld set a pre-trial hearing for January 24, 1958 and set the trial date as April 17, 1958.

Staff: Robert A. Bicks, Daniel M. Friedman, Allen A. Dobey, Donald F. Melchior, Harrison F. Houghton and S. Robert Mitchell (Antitrust Division)

SHERMAN ACT

Stringent Requirement of Proof in Criminal Case That Agent's Declaration to Join Existing Conspiracy Was Authorized by His Principals. United States v. Maryland State Licensed Beverage Association, Inc., et al., (D.Md.). The indictment had charged 55 corporate and individual defendants with a conspiracy to fix liquor prices in Maryland through forced "fair-trading", and with a conspiracy and attempt to monopolize the liquor trade in that State. Eleven of the defendants were voluntarily dismissed by the government. On December 20 and 30, 1957, and on January 3 and 6, 1958, the Court over the government's objection accepted nolo contendere pleas from 38 defendants and imposed fines totalling $160,500 upon them.

Trial against the remaining four corporate and two individual defendants started on January 7, 1958, the Court sitting without a jury. At the close of the government's case, the court found that the government had established the existence of an unlawful conspiracy and a prima facie case against Hiram Walker, Inc., and its President, Ross Corbit, but acquitted the remaining 4 defendants. At the close of the defendant's case, the Court found that the essential facts were not in dispute but that he could not find beyond a reasonable doubt that the defendants' agents had authority to communicate to various co-defendants that information which, the Government contended, established the remaining defendants' adherence to the conspiracy. The Court stated that it was equally probable under the evidence that the agents did not have authority, and that their information which they gave to co-conspirators was false and designed to mislead members of the conspiracy as to Hiram Walker's position with regard thereto. Similarly, the Court was not persuaded by the government's contention that defendants had ratified the acts and declarations of their agents by accepting the benefits therefrom in silence, because the institution of the grand jury investigation occurred immediately after the agents' communications, leaving almost no time for defendants to repudiate the agents' acts. Therefore, Hiram Walker, Inc., and president Corbitt were found not guilty.

On January 16, 1958, Judge Thomsen, after argument, overruled the motions of 19 defendants for reduction of sentences.

The defendants Melrose Distillers, Inc., CVA Corporation and Dant Distilling and Distributing Company, all of whom pleaded nolo contendere, subject to their right to appeal, have noted such appeal on the ground that the respective corporations have been dissolved. The Court had previously ruled that, although those corporations had been dissolved prior to indictment, the criminal action had not abated as to them.

Staff: Wilford L. Whitley, Jr., John H. Earle and John C. Fricano (Antitrust Division)

Court Rules for Government in Case Involving Operation of Bid Depository. United States v. Bakersfield Associated Plumbing Contractors, Inc., et al., (S.D. Calif.). On June 28, 1955, a civil complaint was filed herein, charging three local trade associations respectively composed of plumbing contractors, sheet metal contractors and electrical contractors operating in the Bakersfield, California area, with violating Section 1 of the Sherman Act by unreasonably restraining interstate trade in construction supplies through the operation of a bid depository. According to the complaint, defendants have organized and operated a bid depository relating to the sale and installation of construction supplies for building projects in the Bakersfield trade area, have adopted and enforced rules for the depository, have induced and compelled their members and others to use the depository, have induced and compelled general contractors to limit contract awards to bids submitted through the depository, have induced and compelled association members to boycott general contractors who do not undertake so to limit contract awards, and have channeled to sub-contractors submitting to the depository rules the selling and installation of construction supplies for building projects in the Bakersfield trade area, excluding others therefrom. A copy of the bid depository rules in question is attached to the complaint.

By an order dated December 31, 1957, Judge Jertberg ruled that the government is entitled to a decree as prayed for in its complaint. The complaint asked that the defendants be enjoined from conducting bid depositories relating to construction supplies for building projects in the Bakersfield trade area. Judge Jertberg ruled, however, that the injunction "initially is to remain in effect for a period of one year following the entry of the decree, and thereafter perpetually, unless the defendants should, within said period of one year, present to the court a plan for the operation of a bid depository which meets with the approval of the court."

Staff: James M. McGrath and Edward R. Minor (Antitrust Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Enforcement of Federal Lien; Priority of Federal Government's Mortgage Over Subsequent Municipal Tax Liens. United States v. Ringwood Iron Mines, Inc., the Borough of Ringwood, and State of New Jersey, Borough of Ringwood, Appellant (C.A. 3). In a mortgage foreclosure action brought by the United States, judgment was entered by the district court decreeing that the Federal mortgage was superior and prior to the subsequent liens for municipal taxes. The Borough of Ringwood appealed. The Court of Appeals affirmed. It rejected an argument by the Borough that the priority in time rule should not apply because of actions by the Government in extending time and easing conditions of payment while the local taxes remained unpaid. The Court of Appeals also rejected a contention by the Borough that by enforcing its lien first, it obtained a superior legal right to the property subject only to an "equity of redemption", stating: "The short answer is that, whatever may be the rule as to private mortgages, a sale under state law cannot divest a prior mortgage lien held by the United States. New Brunswick v. United States, supra [276 U.S. 547 (1928)]".

Staff: Harold S. Harrison (Lands Division)

Condemnation; Cancellation of California Taxes Mandatory Under State Statute When Requested by United States on Property It Acquires After Lien Date. County of San Diego, et al., v. United States (C.A. 9, Jan. 13, 1958). Taxes for the fiscal year beginning July 1, 1955, became a lien under California law on the first Monday in March 1955 on certain real estate and improvements. On June 16, 1955, the United States took title to this real estate and improvements under a declaration of taking. It sought to have the taxes cancelled under provisions of the California Revenue & Taxation Code. Upon refusal of the Board of Supervisors of San Diego County to grant the cancellation, the United States obtained a declaratory judgment in the district court, which was hearing the condemnation proceedings, to the effect that the taxes were cancelled. Upon appeal by the City and County of San Diego, the Ninth Circuit affirmed. The Court held that the plain and unequivocal mandate of the California statute was for the Board of Supervisors to cancel the taxes when the United States acquired title after the lien date. The Court also said it could find no support for appellants' proposition that the taxes secured by the lien attached to the funds deposited by the Government. Cancelled taxes do not attach to any fund. Finally, the Court noted that in the ordinary private transaction these taxes would have fallen on the buyer, not the seller. The United States, in fixing compensation for condemned property pays only the fair market value, and does not take into account future taxes to be imposed. The Court thought this was the reason which prompted the legislature to provide for cancellation.

Staff: A. Donald Mileur (Lands Division)

* * *

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

By Proclamation 3216 the President has called attention to the 75th Anniversary of the Civil Service Act on January 16, 1958. The Proclamation is as follows:

> WHEREAS the Federal civil-service system was established by the Civil Service Act of January 16, 1883, and will be seventy-five years old on January 16, 1958; and
>
> WHEREAS the enactment of that act and the establishment thereunder of a merit system of employment within the Federal Government have given impetus to the establishment of similar systems at State, county, and municipal levels of government; and
>
> WHEREAS a strong civil service, based on the merit principle, is now recognized as an essential factor in stable, responsible government in the United States, as well as in many other countries; and
>
> WHEREAS the seventy-fifth anniversary of the Civil Service Act is an appropriate time to salute the Civil Service of the United States and to increase public knowledge and understanding of its importance in our system of self-government;
>
> NOW, THEREFORE, I, DWIGHT D. EISENHOWER, President of the United States of America, do hereby call upon the people of the United States to participate in the observance of the seventy-fifth anniversary of the Civil Service Act on January 16, 1958, and throughout the ensuing year.
>
> I also call upon the heads of Federal departments and agencies, governors, mayors, and other public officials, as well as leaders of industry and labor and members of all public-spirited groups, to study our Federal, State, and local civil-service systems, with a view to their continuous improvement in every way possible, and to arrange appropriate ceremonies in honor of the public service of our able and devoted civil servants throughout the country.

It is expected that the officials and employees of the Department will participate in local programs and celebrations in honor of the 75th Anniversary of the Civil Service Act.

COURT REPORTING

By court order dated January 10, 1958, the District Judges for the Eastern District of Louisiana established the new rate of 55¢ per page for the original of the ordinary transcript to be paid to the official court reporters. The order affirmed existing rates for the original of daily transcript and copies of both original and ordinary transcript. Please make the appropriate change in your Manual.

Several incidents in widely scattered parts of the country suggests the need to remind United States Attorneys who may not be familiar with the rules and limitations on payments for court transcripts that the Manual contains detailed instructions on the subject.

Foremost among the matters requiring emphasis are payments in excess of the officially prescribed rates, procuring no more than the needed number of transcripts, and refraining from any agreements to pay for a portion of a copy (or original) used by the Judge. The latter probably gives the most trouble. As a courtesy the Judge is usually given the original when both sides obtain transcript. This is not objectionable to the Department if, under the arrangement, the cost of the original and one copy is apportioned between the two sides. See Manual, page 131, Title 8. It is objectionable to agree to pay one-half of the cost of the original and then to buy a copy in addition. It is also objectionable to order more copies than are absolutely required simply because the reporter contends he cannot make any money unless the extra copies are ordered. The rates set out on pages 135 and following, in Title 8 of the Manual, are the maximum rates for ordinary and daily transcript. Higher rates can be paid only for hourly or other expedited copy. Official necessity must control any orders for this type of transcript. The foregoing statements of policy or rules are amply supported by rulings by the Comptroller General of the United States or the Judicial Conference to which reference will be given if requested.

The Department will be glad to give any assistance on any reporting problem you may have.

Department Orders and Memos

The following Memorandum applicable to United States Attorneys Offices, has been issued since the list published in Bulletin No. 2, Vol. 6, dated January 17, 1958.

Memo	Dated	Distribution	Subject
124 Revised	12-16-57	U. S. Attorneys	Revision of the United States Attorneys' Docket and Reporting System Manual.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Validity of Proceedings Instituted by Order to Show Cause Rather Than Warrant of Arrest; Frivolous Actions. Fragakis v. Burrows (E.D. Pa.). United States Attorney Harold K. Wood, Eastern District of Pennsylvania has submitted the following report concerning this case which is quoted in full in view of its probable value in connection with litigation in other districts:

"In the recent deportation case of Theodore Fragakis v. Burrows, Acting District Director, I. & N. Service, the procedure followed and the results obtained are noteworthy. This case sets an important precedent because of the practice of some attorneys to institute actions for the sole purpose of delaying deportation of aliens, there being no real merit to the actions.

"In this case, the plaintiff, an alien, had been ordered to be deported after an administrative hearing. He had not been arrested prior to the hearing, but had been served with a Rule to Show Cause why he should not be deported. The plaintiff filed a Complaint in the District Court for the Eastern District of Pennsylvania seeking review of the deportation and alleging as the sole ground for relief the fact that the administrative hearing was improper because of the provisions of the Nationality Act of 1952, which he contended required that an arrest be made before the hearing. The plaintiff sought a Temporary Restraining Order against deportation, pending final hearing in Court. The Court refused to enter a Temporary Restraining Order, but instead requested I & N. to voluntarily withhold deportation, pending the hearing. The Court further required the plaintiff to post bail for appearance at the hearing.

"Assistant United States Attorney Bernard Sheran filed a Motion for Summary Judgment on the basis of plaintiff's Complaint. A hearing was held on the plaintiff's Complaint for injunction and the Government's Motion for Summary Judgment. The Court entered Summary Judgment forthwith, holding that no cause of action had been alleged. The plaintiff filed a Notice of Appeal to the Court of Appeals for the Third Circuit and simultaneously therewith a Motion to stay deportation, pending the appeal. Mr. Sheran notified the Court of the Government's resistance to the Motion to stay deportation. In addition, the Government filed a Motion to docket and dismiss the appeal on the ground that it was frivolous.

"The Court of Appeals heard argument on the plaintiff's Motion to stay the deportation and the Government's Motion to dismiss the appeal, and on the same day on which the argument was held, it entered an Order dismissing the appeal on the ground that it was frivolous.

"The diligent and alert handling of this matter by Mr. Sheran resulted in a groundless action being dismissed promptly and the thwarting of the purpose of the plaintiff in attempting to delay final disposition of the case by protracted legal proceedings. It should act as a substantial deterrent to other frivolous actions of a similar nature in this District."

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Subsequently the alien's attorney in this case applied to Mr. Justice Burton of the United States Supreme Court for a stay of proceedings pending review on certiorari. Mr. Justice Burton thereafter denied the application for a stay and entered the following order:

> "Upon consideration of this application for a stay, and the brief accompanying it and also of the government's memorandum in opposition to the application, such application for a stay is hereby denied."

Because of its probable value should other actions be instituted challenging the validity of the procedure by which deportation proceedings are instituted by order to show cause rather than warrant of arrest, there is quoted herewith the memorandum filed by the Solicitor General with Mr. Justice Burton opposing the application for stay:

"Petitioner is a seaman who has been ordered deported for overstaying his leave. The only ground on which the order of deportation is attacked is that the proceedings against him were instituted by order to show cause, which left petitioner free of custody until his deportation was determined, instead of by warrant of arrest, which would have meant that petitioner would have had to be taken into custody and held or released on bond. His contention is frivolous, as held by the Court of Appeals.

"Section 19 of the Immigration Act of 1917 had provided that aliens in the deportable classes 'shall, upon warrant of the Attorney General, be taken into custody and deported.' Under that language, it was deemed mandatory to take aliens believed to be deportable into custody by warrant of arrest at the commencement of the deportation proceedings. The Immigration and Nationality Act of 1952, however, provides in section 242(a) that 'pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody' (emphasis added). Section 242 (b) provides for proceedings before a special inquiry officer to determine deportability and specifies the rights of aliens at such hearings. It is thus evident that the new language no longer requires the unnecessary hardship that, in every case, the alien be arrested at the beginning before his deportability has been determined.

"Under the 1952 Act, the Immigration Service issued the regulation here involved (Sec. 242.1), providing for commencement of deportation proceedings by order to show cause which 'will contain a statement of the nature of the proceeding, the legal authority under which the proceeding

is conducted, a concise statement of factual allegations informing the respondents of the acts of conduct alleged to be in violation of the law, and a designation of the charges against the respondent and of the statutory provision alleged to have been violated.' The order will also specify the date for hearing, to be not less than seven days after service except at the request of the alien or for reasons of public necessity. Provision is made in Regulation 242.2 for arrest of an alien under a warrant of arrest when such action seems necessary or desirable to a district director.

"In other words, the usual procedure under the new regulations is to leave an alien free to pursue his regular course until there has been a final determination of deportability. Arrest and custody are used only in special cases. Manifestly, this is of benefit to the alien, and was adopted for that purpose. Since the statute uses the word 'may', not 'shall', with relation to arrest, the Immigration Service clearly had authority to adopt this more desirable procedure."

Communist Party Membership; Evidence of Meaningful Association; Due Process of Law. Fougherouse v. Brownell and Fougherouse v. Boyd (D. Oreg., Jan. 10, 1958). Petition for declaratory judgment and separate petition for writ of habeas corpus to review validity of deportation order. The two causes of action were consolidated for hearing and determination.

The alien in this case was ordered deported because of his membership in the Communist Party during 1936 through 1938. The Government's case rested upon the testimony of four admitted ex-Communist Party members concerning their attendance at closed meetings of the Party with the alien and other similar testimony. The evidence indicated that the alien occupied a position of at least local Party leadership. The Court concluded that the alien had made no contention, nor does the record indicate, that his membership in the Communist Party lacked the kind of 'meaningful association' as to place him under the protection of the exceptions made in Rowoldt v. Perfetto (see Bulletin Vol. 5, No. 26, p. 773). Quite on the contrary, the record shows that the alien was fully aware of the means, aims and ideals of the Communist Party as being dedicated to the overthrow of the government of the United States by force during the period of his membership during which he acted as a leader of the Party on at least the local level.

In the lengthy opinion in the case the Court considered, among other things, the scope of judicial review involved; the adequacy of the hearing given the alien by the Service; the alien's challenges concerning the accuracy of the charges against him, and various other procedural and constitutional contentions made on his behalf. The Court concluded that in its entirety, the hearing was fair and impartial and there is not the slightest indication from the record that the alien was not afforded due process of law throughout his entire dealings with the Service.

Both actions were dismissed.

EXCLUSION

Review Under Administrative Procedure Act; De Novo Hearing Not Permissible; Fraud in Obtaining Visa; Right to Counsel. Van Den Berg v. Lehmann (N.D. Ohio, December 5, 1957). Action under Administrative Procedure Act to review exclusion order.

The alien in this case was ordered excluded from the United States on the grounds that he had previously been convicted of a crime involving moral turpitude and that he had procured his visa by willfully misrepresenting the material fact that he had a criminal record.

In this court proceeding the alien's counsel requested permission for the alien to take the witness stand to testify concerning his case. The Court refused this permission on the ground that, if granted, it would have converted the proceeding from a "review" to a trial de novo, which is not authorized under the Administrative Procedure Act. Review of proceedings under section 10 of that Act does not contemplate an original hearing before the district court where additional evidence may be offered and the transcript of the agency disregarded.

The Court observed that the alien in the administrative proceeding was granted an opportunity to fully explain his answers to the questions in his visa application and that he ought not to be permitted to obtain a visa and then repudiate the statements contained in his application on which the consular officer relied in issuing the visa to him. The conditions prescribed by the Immigration and Nationality Act under which a visa may be issued may not be ignored or waived. The Court also said that the alien had been granted every opportunity to obtain counsel in the administrative proceedings and had refused. His contention in the court proceedings, that since he had not been represented by counsel he consequently could not protect his rights, was rejected in view of the record. The Court said that the government was certainly not required to force counsel on someone who did not desire to be represented.

Complaint dismissed.

* * *

OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Burden of Proof: Bare Possession of Bearer Securities Not Sufficient to Establish Plaintiff's Ownership Under Trading With the Enemy Act. LaDue & Co. v. Rogers (D.C. N.D. Ill. E.D., January, 1958). In 1953 the Custodian vested certain certificates of corporate stock of the City of New York and two St. Louis Southwestern Railway Company bonds then held by LaDue & Co., a brokerage firm of Chicago, Illinois. The securities were bearer securities which the Custodian had found were owned by nationals of Germany.

In this suit under Section 9(a) of the Trading with the Enemy Act plaintiff sought to compel the Attorney General to return the above securities on the ground that plaintiff was an Illinois corporation owned by an American stockholder and had possession of the bearer securities prior to vesting. It appeared at the trial that the securities had been sent to the plaintiff by Gibbon, Alonso y Cia, a Mexican corporation, for collection, and that the plaintiff's role was to collect the securities, retain a commission and hold the proceeds subject to the instructions of Gibbon, Alonso y Cia or one Herman W. Brann who owned plaintiff and was also a shareholder of Gibbon Alonso y Cia. The Custodian argued that under the Trading with the Enemy Act the plaintiff must establish its own beneficial interest in the securities and that the plaintiff here being merely an agent for collection had no such beneficial interest as would enable it to recover the vested property.

The Court entered judgment for the defendant holding that the plaintiff had not established its beneficial ownership of the property in suit and that the plaintiff was at all times merely an agent for collection which was not sufficient to sustain recovery under the Act.

Staff: The case was tried by Robert J. Wieferich (Alien Property), assisted by Assistant United States Attorney Nicholas G. Manos (N.D. Ill.).

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