

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

February 5, 1954

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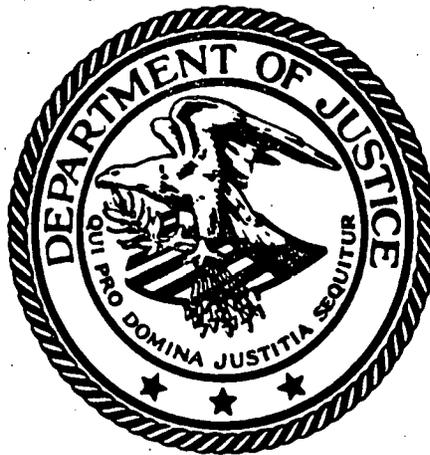
FEB 8 - 1954

U. S. ATTORNEY
LOS ANGELES, CALIF.

United States
DEPARTMENT OF JUSTICE

Vol. 2

No. 3



UNITED STATES ATTORNEYS
BULLETIN

RESTRICTED TO USE OF
DEPARTMENT OF JUSTICE PERSONNEL

UNITED STATES ATTORNEYS BULLETIN

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FORMS

A preliminary survey is being undertaken with regard to the possibility of standardizing many forms commonly used in the various United States Attorneys' offices. Such forms now are designed and mimeographed locally or are forwarded to the Department for special printing. While the need for some special forms may be dictated by the requirements of the court in a particular district, it is believed that in most instances, forms can be designed for use in all districts, thus eliminating the duplication presently existing. It also appears that some offices will benefit by the use of certain forms, which are employed in other districts, if such forms are standardized and carried in stock. All in all, uniformity of forms and procedures will result in increased efficiency and economy.

For this purpose all United States Attorneys are requested to transmit to the Executive Office for United States Attorneys two copies of all forms used in their offices, whether requisitioned from the Department or prepared through mimeographing or other processes in their offices, except those listed in the Department's "List of Supplies and Forms Carried in Stock."

A description of the forms used by you and any comments or recommendations which you have regarding this project will be appreciated.

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ROTATION OF ASSIGNMENT

On some occasions the Department and certain United States Attorneys' offices have been embarrassed because unexpected changes in personnel have left the offices without attorneys experienced in the handling and trial of specific types of cases. This is particularly true in the prosecution of income tax evasion cases. Some offices have assigned all cases of a particular nature to one attorney who specializes in such matters. Consequently, when such attorney leaves Government service, there is no other legal assistant sufficiently acquainted with that type of work to carry on, and request is then made of the Department for assistance. Many times it is not possible to furnish this help because of limited personnel and appropriations.

United States Attorneys are urged to keep this problem in mind when assigning cases to their assistants. They should rotate such assignments so that the attorneys will acquire experience and knowledge in more than one specialized class of cases and thus be available to take over other matters in the event of prolonged absences or sudden termination of employees.

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ATTORNEY GENERAL'S RECRUITMENT PROGRAM

In his speech before the University of Texas Law School, at Austin, Texas, on December 5, 1953, the Attorney General outlined a recruitment program under which the Department of Justice would obtain from law schools throughout the country the best qualified law graduates for employment in the Department. The details of this program were set out in Vol. 1, No. 10 of the United States Attorneys Bulletin, dated December 11, 1953. The Attorney General's Recruitment Program has evoked a splendid response and applications thereunder will continue to be received for a brief additional period. A Departmental committee will soon begin upon the task of review and consideration of such applications, after which a selection will be made of those to be offered employment in the Department. We would appreciate the cooperation of the United States Attorneys in this program to the extent of suggesting the names of any outstanding senior law students who are particularly qualified and who would be interested in participating. The applicants should execute a form 57, which you may forward directly to the Deputy Attorney General with any comment you may wish to make.

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CORRESPONDENCE

United States Attorneys are reminded that correspondence addressed to the Department should be directed to the Assistant Attorney General in charge of the division which is handling the particular matter involved. Thus, for example, where the United States Attorney receives communications from the Civil Division or Antitrust Division, the answer thereto should be directed to the Assistant Attorney General in charge of the Civil Division or Antitrust Division as the case may be. The proper addressing of mail to the Department will facilitate its prompt receipt by the divisions concerned.

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CRIMINAL DIVISION

Assistant Attorney General Warren Olney III

CIVIL RIGHTS

Brutality to Female Jail Inmate. United States v. Howard R. Edwards (S.D. Texas). (See previous reference to case in Vol. 1, United States Attorneys' Bulletin, No. 9, page 7.) On January 14, 1954, jury trial being waived, Edwards was tried before the court for the severe flogging of a Mexican-American girl inmate of the county jail. The Court (Judge James V. Allred) found the defendant guilty and imposed a \$100 fine.

In imposing sentence the Court stated he was of the view that at most the case presented an aggravated assault that should have been handled by the State authorities, and for that reason he was imposing a fine that would have been imposed for the State offense. A State Grand Jury had previously heard the case, but did not return an indictment.

In connection with Judge Allred's observations, it is believed that the comments of Judge Hatch, in denying a motion for reduction of the maximum prison sentence in a Civil Rights case (see Vol. 10, Criminal Division Bulletin, No. 14, pages 2-3), bear repetition: "* * * the offense with which these men were charged, and of which they were convicted, is to my mind one of the gravest offenses known to the laws of our country. The thing that distinguishes our country from practically all the countries of the world is the freedom of the individual; that his civil rights are safeguarded by our Constitution. And anyone who invades those constitutional rights and privileges and deprives any citizen of our land, no matter what may be his station in life or his color or his creed, has struck at the very foundations of free government. To my mind the penalty provided by the statute making it only a misdemeanor is entirely inadequate for the offense committed. * * *"

Staff: Assistant United States Attorney Joseph Lev Hunt (S.D. Texas).

SUBVERSIVE ACTIVITIES

National Labor Relations Board - False Statements in Non-communist Oath. United States v. Hupman (S.D. Ohio). On November 21, 1952, an indictment was returned against Everst Melvin Hupman charging him in two counts with violation of 18 U.S.C. 1001 for falsely stating in an Affidavit of Noncommunist Union Officer required to be filed with the National Labor Relations Board pursuant to Section 9(h) of the Labor Management Relations Act of 1947 that he was not a member of or affiliated with the Communist Party. After a protracted trial at Dayton, Ohio,

in August, 1953, which resulted in a hung jury, the defendant was retried at Cincinnati, Ohio, and convicted on both counts on January 15, 1954. He was sentenced to five years and \$5,000 fine on the first count and five years on the second count to run concurrently.

Defendant was formerly a member of the Executive Board of Local 801, United Electrical, Radio and Machine Workers of America which was ousted from the CIO because of Communist activity.

Staff: Joseph C. Bullock, Special Assistant to the United States Attorney; Thomas Stueve, Assistant United States Attorney (S.D. Ohio)

, National Labor Relations Board - False Statements in Noncommunist Oath. United States v. Clinton E. Jencks (W.D. Texas). An indictment was returned on April 20, 1953, charging a violation of 18 U.S.C. 1001 on two counts. The first count alleged that the defendant filed a false statement with the National Labor Relations Board when he stated in an "Affidavit of Noncommunist Union Officer," dated April 28, 1950, that he was not then a member of the Communist Party. The second count alleged that the defendant filed a false statement when he stated in the same document that he was not then affiliated with the Communist Party. Jencks was convicted on both counts on January 21, 1954, and sentenced to five years on each count to be served concurrently.

Staff: United States Attorney Charles F. Herring; Assistant United States Attorneys Holvey Williams and Francis C. Broaddus; and Joseph Alderman, Criminal Division.

FRAUD

False Statements in Application for Federal Employment. United States v. Jeremiah Wilkins (District of Columbia). On November 12, 1953, Wilkins pleaded guilty to an indictment returned against him on August 17, 1953, charging him with violating 18 U.S.C. 1001. Defendant, who was formerly employed by the General Services Administration as a laborer, failed to disclose in his application for federal employment that he had been arrested subsequent to his sixteenth birthday for other than minor traffic violations. An investigation disclosed that Wilkins had been arrested eight times from 1934 through 1950 and had served two sentences for housebreaking and one sentence for interstate transportation of a stolen motor vehicle. Defendant was sentenced to imprisonment for a period of six months to two years.

Staff: Assistant United States Attorney E. Riley Casey (District of Columbia).

False Statements in Application for Federal Employment. United States v. McKinley Mason Young (District of Columbia). On August 27, 1953, the defendant was indicted under 18 U.S.C. 1001 for falsifying applications for employment submitted to the General Services Administration and St. Elizabeth's Hospital with respect to prior arrest, discharges from prior employment, employment experience and other matters. On November 10, 1953, the defendant entered a plea of guilty and on December 4, 1953, was sentenced to a term of imprisonment of four months to one year and a day.

Staff: Assistant United States Attorney William B. Bryant
(District of Columbia).

* * *

CIVIL DIVISION

Assistant Attorney General Warren E. Burger

SUPREME COURTLIMITATIONS OF ACTIONS

Retroactive Application of Statute of Limitations to Action Brought by United States. United States v. Harold T. Lindsay, et al. (No. 94, October Term, 1953, January 18, 1954). In an eight to one decision, the Supreme Court has held that a suit brought in February, 1952, on a cause of action which accrued to the Commodity Credit Corporation in February, 1945, is barred by the six year time limitation imposed by Section 4c of the Commodity Credit Corporation Charter Act of 1948. Section 4c provides that "No suit by or against the Corporation shall be allowed unless (1) it shall have been brought within six years after the right accrued on which suit is brought." The Court rejected the Government's contention that, as to causes of action antedating Section 4c, the time limitation was prospective only and commenced to run from the effective date of the Act rather than the date the cause of action came into being. Noting that no constitutional question was raised by giving Section 4c a retroactive effect and that Congress might well have intended the effect ascribed, the Court declined to follow decisions which have given a prospective interpretation to statutes of limitation couched in language not dissimilar to that of Section 4c. This decision resolves a conflict between the First and Sixth Circuits. Cf. Field Packing Co. v. United States, 197 F. 2d 329 (C.A. 6).

Staff: Paul A. Sweeney, Melvin Richter and John G. Laughlin,
(Civil Division).

COURT OF APPEALSDAMAGES

Recovery of Damages for Loss of Future Profits. United States v. Griffith, Garnall & Carman, Inc. (C.A. 10, No. 4704, January, 6, 1954). Plaintiff contracted to lay a water-pipe line across lands adjacent to an Air Force Base. Due to the negligence of Government employees large quantities of rain water overflowed from the air field, destroying a substantial portion of the pipe line. In an action under the Tort Claims Act the District Court entered judgment for plaintiff in the total sum of \$33,380.00. Of this amount, \$15,000 represented a loss of profits and injury to plaintiff's business, destruction of credit and reduction of net worth. The Court of Appeals held that there was no substantial evidence to support this award of special damages. It noted that damages for loss of profits and for injury to or

interruption of a business will be allowed only where they can be established with reasonable certainty and are the proximate result of the wrong complained of. While the president of plaintiff company had made an estimate as to the profit the company would have made during the period it was occupied with repairing the pipe, there was no evidence as to how many contracts plaintiff might have obtained during that period. Nor was there any evidence introduced to show that weather conditions would have permitted work had plaintiff been a successful bidder at a contract letting or had otherwise obtained contracts. The court's conclusion was that in these circumstances, the estimate of plaintiff's president represented "pure guess work" and that the loss was far too speculative to sustain a judgment on the claim for special damages.

Staff: A. Pratt Kesler, United States Attorney and
H. D. Lowery, Assistant United States Attorney
(D. Utah).

FEDERAL JURISDICTION

Jurisdiction of Courts of Appeals to Review Determinations of the Military Court of Appeals. Shaw v. United States; Begalke v. United States. (C.A.D.C. Misc. Nos. 397, 398, January 21, 1954). Shaw and Begalke were tried and convicted by a general court-martial and given dishonorable discharges from the Navy. The Court of Military Appeals entered orders dismissing their petitions for review whereupon they petitioned the District of Columbia Circuit to review these orders, moving at the same time for leave to proceed in forma pauperis. The Government opposed the motion, contending that the Court of Appeals was without jurisdiction over the proceedings. The Court sustained the motion and denied leave to file the petitions on the ground that there was nothing in the Uniform Code of Military Justice or any other statute conferring power upon civil courts to review determinations of the Court of Military Appeals. In answer to the petitioners' contention that the Court had such power in view of its Rule 38, providing for review of orders of administrative agencies, the court observed that, while the Military Court might perhaps be considered within the military establishment, it was nevertheless a court and not an administrative agency. The Court of Appeals further noted, that, in any event, Rule 38 only applies to those administrative determinations which Congress has by statute specifically authorized the District of Columbia Circuit to review. The Court was careful however, to limit its decision to its jurisdiction to undertake direct review, pointing out that the Supreme Court has held that the civil courts have jurisdiction over applications for habeas corpus from military prisoners. Gusik v. Schilder, 340 U.S. 128; Burns v. Wilson, 346 U.S. 137.

Staff: Leo A. Rover, United States Attorney, Gerard J. O'Brien, Jr. and William J. Peck, Assistant United States Attorneys (D. D.C.).

NATIONAL SERVICE LIFE INSURANCE

Contest of Policy for Fraud in the Reinstatement. United States v. Barney B. Thompson (C.A.D.C., No. 11778, December 31, 1953). This action for the death benefits of a National Service Life Insurance policy of a veteran discharged from the service with a heart condition was defended on the ground that the reinstatement of the policy had been obtained by false and fraudulent answers to questions 8 and 9 in the application for reinstatement. The Government contended that the insured's health progressively deteriorated and that the stipulated facts established each of the elements of fraud set forth in Pence v. United States, 316 U.S. 332. The Court of Appeals affirmed the judgment of the District Court in favor of the plaintiff and stated with reference to question 8 in the application for reinstatement that it was not clear the veteran knew his health was worse. The Court admitted that his answer to question 9, to the effect that he had not been ill or prevented from attending his usual occupation by reason of illness or consulted a physician concerning his health since the lapse of his insurance, was erroneous for he had been physically examined since lapse with a diagnosis of heart disease and he had given up his employment and had received treatments for his condition. However, the Court regarded question 9 as ambiguous (contra see McDaniel v. United States, 196 F. 2d 291 (C.A. 5) and Clohesy v. United States, 199 F. 2d 475 (C. A. 7)) and stated that since the veteran was a "laborer without much education" he might have thought question 9 related solely to illnesses contracted since lapse. The Court further thought the insured might reasonably have understood that his C file, to which reference was made in his answer to question 10, contained all data relevant to question 9. It was admitted that the indications were the insured intended to deceive the Government, but that this had not been established by such clear and convincing evidence as to render the decision of the district Court clearly erroneous. The Court of Appeals did not reach the issue of reliance raised by the District Court's holding that the listing of the veteran's C number on his application for reinstatement was actual notice to the Veterans Administration of the contents of his C file. This issue is the subject of conflicting decisions. See United States v. Kelley, 136 F. 2d 823 (C.A. 9); McDaniel v. United States, 196 F. 2d 291 (C.A. 5); and see Clohesy v. United States, 199 F. 2d 475 (C.A. 7).

Staff: Russell Chapin (Civil Division)

STATUTES OF LIMITATION

Six-year Period of Limitation in the False Claims Act Applies to the United States -- No Statute Runs Against the Government on Suits for Common Law Fraud or for Recovery of Subsidies Under the Emergency Price Control Act of 1942. United States v. Aaron Borin (C.A. 5, No. 14,534, January 5, 1954). Approximately seven years after livestock slaughter subsidies had been paid by the Reconstruction Finance Corporation to the defendant as a result of false reports submitted by him, action was instituted seeking recovery on three alternative bases: (a) Recovery of the subsidy payments under regulations published pursuant to the Emergency Price Control Act of 1942 (50 U.S.C., App. 902); (b) Recovery of the subsidy payments as common law damages caused by defendant's fraud; (c) Double the subsidy payments, plus forfeitures, under the False Claims Act (31 U.S.C., 231-235). The Court of Appeals denied recovery under the False Claims Act, but allowed recovery on the two other counts. It held that both the unequivocal wording of Section 235 imposing a six-year period of limitations for actions under the False Claims Act and the legislative history of the original enactment and of the 1943 amendments demand a conclusion that Section 235 is applicable whether the action is instituted by an informer or by the United States, and that the period begins to run from the date of the fraud rather than the date of its discovery. In allowing recovery on the alternative counts, the Court held that the Congressional imposition of the special sanctions of the False Claims Act is not to be interpreted as fixing an exclusive remedy in case of fraud on the Government. Its right to seek recovery for actual damages resulting from fraud, or recovery of the subsidies under the Emergency Price Control Act, is unimpaired and is not subject to any statute of limitations. The court rejected a defense contention that the fact that the Reconstruction Finance Corporation is amenable to suit calls for a conclusion that actions based on its claims are subject to general statutes of limitations applicable to all corporate plaintiffs. The Court held that in administering the subsidy program, the Reconstruction Finance Corporation was acting as a mere agency of the United States and that its claim based on defendant's fraud belongs to the United States and that the United States was the proper party plaintiff.

Staff: Maurice S. Meyer (Civil Division)

VETERANS

Finality of Decisions of the Administrator of Veterans Affairs, Silverstein, as Guardian of Gellis, an Incompetent v. United States, (C.A.D.C., No. 11600, December 3, 1953). Gellis was convicted of a criminal offense by the Municipal Court of the District of Columbia and, when found to be of unsound mind, was committed to St. Elizabeth's Hospital in lieu of imprisonment. Suit was brought to recover from Gellis'

guardian the costs of his maintenance at the hospital. See Title 24, Section 301 of the District of Columbia Code. The guardian urged that the disability compensation payments to which Gellis was entitled as a totally disabled veteran with a service connected disability had been discontinued by the Veterans Administration because Gellis was being maintained at Government expense, and that the sums withheld should be offset against the claim of the United States. The District Court rejected this contention, refused to inquire into the discontinuance of compensation payments (see 38 U.S.C. 11a-2) and entered judgment in favor of the United States. The Court of Appeals reversed and held that, giving finality to the "ruling" that the veteran was being maintained at Government expense, the guardian "does not owe the bill." The dissent of Judge Edgerton points out that the only thing "decided" by the Veterans Administration was that by regulation, all compensation should cease. The dissent follows the argument of the Government that the court was without jurisdiction to review the decision of the Veterans Administration and that the claimed credit had not been submitted to the General Accounting Office for allowance or disallowance as required by 28 U.S.C. 2406.

Staff: Russell Chapin (Civil Division)

DISTRICT COURT

CIVIL SERVICE

Notice of Charges to State Department Employee Held Sufficiently Specific under 5 U.S.C. 562. Bennett v. Dulles (D.D.C., No. 4981-52, January 11, 1954). Plaintiff was an employee of the Department of State occupying a position in the classified Civil Service and possessing Civil Service status. Upon separation from the service, she brought this action for reinstatement in her position. On motion for summary judgment, the District Court gave judgment for the Government, holding *inter alia* that sufficient notice of the charges, as required by 5 U.S.C. 562, had been given to plaintiff by the letter of charges of the State Department. This letter set out at some length the extent of plaintiff's inability to perform her duties and her uncooperative attitude toward those duties and her supervisors, requiring the supervisors to spend an inordinate amount of time guiding plaintiff, and named at least two specific instances of plaintiff's unsatisfactory performance. It further stated that plaintiff's supervisors had believed that her difficulties were being caused by her health, that they had arranged for a psychiatric examination to which plaintiff had refused to submit in the first instance, that later examination had resulted in a recommendation by Public Health Service officials that plaintiff be retired as unfit to continue in Government service, that the Department had applied for plaintiff's retirement on grounds of disability, but that application had been rejected by the Civil Service Commission. The letter concluded that

"it is proposed therefore to separate you from the service for inability to perform the duties required of your position." The Court held that "the charges here are not lacking in specificity, and satisfy the requirements of the statute and the regulation in this respect." It is noteworthy that the Court reached this conclusion in a situation where the defendant's notice of separation had stated not that the discharge was made for unsatisfactory performance, but was for "separation (disability)." The latter quoted phrase is defined in the Federal Personnel Manual as "separation of an employee whose mental or physical condition renders him incapable of performing the duties of his position and who is ineligible for disability retirement" The Court stated in a footnote that the present decision did not appear to be in conflict with the recently decided cases of the District of Columbia Circuit in Money v. Anderson and Manning v. Stephens.

Staff: Leo A. Rover, United States Attorney, and Oliver Gasch, Frank H. Strickler, and Rufus E. Stetson, Jr., Assistant United States Attorneys (D.D.C.)

CONTRACTS

Government Official Had No Authority to Enter into Agreement Altering Terms of Contract. United States v. City and County of San Francisco (N.D. Cal., So. Div., Civil No. 27851-H, December 11, 1953). By the Raker Act of 1913, 38 Stat. 242, the United States granted to the defendant certain public lands and rights of way in the Yosemite National Park and the Stanislaus National Forest. The defendant was to build and assign certain roads and trails in the park and forest to the United States and pay certain sums to the United States which were to be used for building and maintaining the improvements. The defendant was also to reimburse the United States for the actual cost of maintenance for the roads. In December, 1930, the defendant submitted to the Department of the Interior a proposal to pay \$1,250,000.00 in five annual installments on a road and construct one additional road in consideration of being relieved of all further road building obligations under the Raker Act. This was approved by the Secretary of the Interior. In October, 1932, a second agreement was entered into by the Acting Secretary of the Interior, and the defendant, designed to clarify and simplify the 1930 agreement, and without imposing any additional conditions on the defendant, provided that the defendant would no longer maintain any roads or trails within the boundaries of Yosemite National Park. During the fiscal years 1929 to 1940, the United States expended \$27,313.82 for maintenance and repair of the roads in the park. The suit was instituted against the defendant to recover this expenditure. The court held that the Acting Secretary of the Interior had no authority under the Raker Act to enter into the October, 1932, agreement and that the agreement was void and illegal and had no force and effect.

Staff: Lloyd H. Burke, United States Attorney, and Frederick J. Woelflen, Assistant United States Attorney (N.D. Cal.); H.W. Libbey (Civil Division).

T A X D I V I S I O N

Assistant Attorney General H. Brian Holland

PINBALL MACHINE FORFEITURES

Forfeitures - Coin-Operated Amusement Machines (Pinball Machines). United States v. One Bally Dude Ranch Coin-Operated Pinball Machine, Serial No. 1050, and \$6.25 in United States Coins, (DC M.D. Tenn.) Civil No. 1778. On December 17, 1953, Judge Elmer D. Davies rendered a memorandum opinion in which he held that a pinball machine was a "coin-operated amusement or gambling device" within the meaning of 26 U.S.C. 3267, that as the element of chance was present in the employment of the machine it was susceptible of use to "entitle the person playing or operating the machine to receive cash, premium, merchandise, or tokens," and that the machine and any coins found in it when used in violation of the internal revenue laws as a gambling device without the payment of the \$250 tax are subject to forfeiture under 26 U.S.C. 3116.

Judge Davies' opinion is called to the attention of the United States Attorneys since this office is informed that a nation wide drive for the enforcement of Section 3267 of the Internal Revenue Code (26 U.S.C. 3267) is being conducted by the Internal Revenue Service.

Staff: James L. Roberts, Assistant United States Attorney, (M.D. Tenn.).

REVOCATION OF PROBATION - INCOME TAX EVASION CASE

United States Attorney Roy L. Stephenson, Southern District of Iowa, recently advised the Department that in the case of United States v. Dr. Cecil C. Jones, Judge William F. Riley, United States District Judge, revoked defendant's probation when evidence was produced before him indicating further tax evasion practices by the defendant. Dr. Jones had been granted probation on May 9, 1952, for a period of two years on a plea of nolo contendere to a charge for evasion of his 1945 income tax. Special agents of the Internal Revenue Service discovered the doctor had evaded a portion of his income tax for 1952. When this matter was properly brought to the court's attention the defendant's probation was revoked and he was sentenced to the custody of the Attorney General for a period of two years.

Staff: Roy L. Stephenson, United States Attorney, (S.D. Iowa).

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LANDS DIVISION

Assistant Attorney General Perry W. Morton

CONVEYANCE OF LAND

Suit Against the United States. West Coast Exploration Co. v. Douglas McKay (C.A. D.C.). West Coast Exploration Company sued the Secretary of the Interior to compel conveyance of ten acres of valuable mineral land in California. The Secretary had rejected plaintiff's attempted location of military scrip on the land. The Secretary defended on the merits on three independent grounds: (1) that the scrip could be located only on lands open to private entry and that these lands never had been open to such entry; (2) that mineral lands in California had always been excluded from entry under public land laws and hence from entry by scrip location; and (3) that the lands had been validly withdrawn from any mode of disposition both by statute and by Executive Order prior to plaintiff's attempted entry. The trial court held for the Secretary on the merits and West Coast appealed.

On argument before a three-judge appellate court, the court raised the question of whether the suit was in fact a suit against the United States for which Congressional consent had not been given and for which jurisdiction was lacking. The case was subsequently reargued before the full bench of nine judges, where it developed that the principal interest of the court was in the jurisdictional question. On January 26, 1954, the court's opinion was handed down. Five judges concluded this was a suit against the United States which must be dismissed for lack of jurisdiction. However, they found it necessary to find against West Coast on the merits, being of the view that unless they so found, the suit could be maintained. Two of these five, in a separate opinion, concurred but found it necessary to consider and sustain only the first defense interposed by the Secretary. Two of the remaining three judges in a separate opinion held it was a suit against the Government without considering the merits, while the other in a short opinion expressed the same view. Thus all eight judges (one of the nine had died before judgment) held the suit to be in fact against the United States and one over which the courts lack jurisdiction, and those who reached the merits found for the Secretary.

Staff: Fred W. Smith (Lands Division)

CONDEMNATION

Interest Payable Only After Taking. United States of America v. Lawrence M. Mahowald, et al. (C.A. 8). This was a condemnation proceeding to acquire land for use of the Garrison Dam and Reservoir Project on the Missouri River, in North Dakota. At the time of the trial for determination of just compensation on fourteen tracts the Government had not taken physical possession of the lands, nor had a declaration of taking been filed. The parties stipulated that the "time of taking" of said lands was the "time of trial." The lands were valued as of the date of the trial. Some five or six months later, declarations of taking were filed on the

fourteen tracts, and estimated compensation deposited. When a judgment was later entered on the jury verdict, interest was allowed on the entire amount of the verdicts from the date of trial to the respective dates of the filing of the declarations of taking. The Government appealed from this part of the judgment, contending that the stipulation that the "time of taking" was the "time of trial" was for the purpose of valuation only.

The court of appeals reversed the part of the judgment appealed from, holding that the stipulation obviously was made for the purpose of fixing the time as of which the market value of the lands should be determined by the jury. It deprived the owners of nothing and gave the Government no interest in their lands. The jury awards merely fixed the compensation which would have to be paid for the lands if and when the Government took physical possession of them or filed declarations of taking.

Staff: Elizabeth Dudley (Lands Division)

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ANTITRUST DIVISION

Assistant Attorney General Stanley N. Barnes

DEVELOPMENTS IN ANTITRUST ENFORCEMENT

In an address before the New York State Bar Association Section on Antitrust Law on January 28, 1954, in New York City, Attorney General Brownell discussed the present administration's plans to preserve the freedom for initiative and opportunity which is at the heart of our antitrust laws. Mr. Brownell began by showing that in the first year of the present administration 11 civil and 18 criminal cases have been instituted, which case volume compares favorably with recent past years.

But far more important than statistics are the policies guiding the selections of causes and the bringing of cases. The administration has begun cases aimed not at mere doctrinal perambulation but at making real strides toward either cracking restraints on market entry or controls over price. Thus far, most of the cases have attacked such traditional violations of antitrust laws as price fixing, allocation of customers or territories, and boycotts.

In addition to moving against restraints of trade such as those above, the Department is also acting, under Section 2 of the Sherman Act, to remove barriers and monopolistic practices stifling competition. Especially will this be true in the case of new industries developing from improved technology. Competition in the research laboratories is as important as competition in the market place.

Equally as important as maintenance of competition on the research and production levels is its maintenance in the distributive processes.

Efforts will be made to enforce Section 7 in the light of the congressional intent as exemplified in the House report which recommends intervention "when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize." In seeking to carry out this congressional intent, two policy questions have already arisen. First, at which stage in a market characterized by successive acquisition should action be instituted? Should the Department move in when it believes a trend is developing or should it wait until a market rearrangement has already taken place? The second question is how can the Department learn of proposed mergers soon enough so that, where necessary, premerger injunctive proceedings may replace postmerger divestiture actions?

Turning then to the question of delay and uncertainty in antitrust litigation, Mr. Brownell showed that vigorous action by the Department has resulted in 60% more cases having been terminated in the period

from May 1, 1953 to January 20, 1954, than in the previous similar period. In addition, the Division, with the cooperation of defense counsel, has been making progress in cutting the length of trials by extensive use of stipulations of facts and documents, by resort to interrogatories and stipulation covering voluminous data, and by agreements on statements of facts. The value of these measures may be demonstrated by one case in which the trial period was reduced from an estimated three to four weeks to a bit more than one day.

Another facet of the antitrust problem is the question of uncertainty which is felt to exist in some areas of the law. The Attorney General has appointed a National Committee to Study the Antitrust Laws. This Committee of some sixty members - practicing lawyers, law professors and economists - represents men well-versed in antitrust problems, men who represent divergent views on the questions of antitrust policy.

This group's purpose is to weigh policy rather than to gather facts and its recommendations will be addressed to enforcement agencies and the courts as well as to the Congress. The Committee has been subdivided into various groups and all groups are well advanced on their reports. It is hoped to have the entire report available in the fall. The report, it is believed, will form a sound foundation for such further action, legislative or administrative, as may be necessary.

Mr. Brownell concluded by stating that in recent years, all of us have acquired a new realization of the values and principles upon which our American society is based. Our political and social freedom under a representative Government requires the solid foundation of a free economy. In order for democracy to survive and be strong, we have learned that its economic liberty must be safeguarded and maintained. "The primary aim of all Governmental regulation of the economic life of the community should be, not to supplant the system of private economic enterprise, but to make it work."

THEORIES AND PRACTICE OF ANTITRUST ENFORCEMENT

On January 28, 1954, Assistant Attorney General Stanley N. Barnes addressed the New York State Bar Association Section on Antitrust Law on "Theories and Practice of Antitrust Enforcement." Judge Barnes stated that the obligation of the Antitrust Division is not to order the nation's economy nor to experiment with the effect of the elimination of lawful and legitimate market influences. The essential goal of antitrust enforcement must remain the removal of artificial barriers to competition.

Antitrust programs are shaped, primarily, from complaints made to the Division by businessmen and consumers. Thus, the only practical selectivity which the Division enjoys is found in the decision as to what complaints are investigated, under what legal theories the cases are brought, and in the economic consequences sought to be achieved by the institution of those cases.

As to the question of whether a civil or criminal case is to be filed, the answer is that the criminal cases are filed when there are involved violations of law which courts have consistently held to be per se violations. Thus, all criminal cases filed since last May, with one exception, have involved such violations as price fixing, allocation of territories or customers, and boycotts.

Judge Barnes explained the "railroad release" procedure of the Division. Under this procedure, the Department reviews industry plans or programs to determine whether it will waive its right to institute criminal proceedings with respect to that particular plan or program. The Department always reserves the right to institute civil proceedings.

The Division's policy on proposed mergers was also set forth by Judge Barnes. Prior to any merger, the Division permits the parties involved to confer with Division representatives concerning the details of the proposed merger. Following such conferences, the Division, if it finds that the proposed merger does not raise serious questions under the antitrust laws, may indicate in writing to the parties that it does not intend to take legal action against the merger but it reserves the right to take action if subsequent developments and operations so warrant.

Judge Barnes concluded by stating his view that the antitrust laws are strong legal instruments to shore up our system of free enterprise by insuring to all who wish to enter any field or to start any new industry freedom to do so without fear of arbitrary restraints and predatory practices by those already established.

PROGRESS IN STUDY OF ANTITRUST LAWS

On January 28, 1954, Professor S. Chesterfield Oppenheim addressed the meeting of the Antitrust Section of the New York State Bar Association on the "Program and Progress of the Attorney General's National Committee to Study the Antitrust Laws."

When the National Committee was announced by the Attorney General he declared there was an "imperative need of a thoughtful and comprehensive study of our antitrust laws."

The Committee's task is to analyze and evaluate the fundamentals of our national antitrust policy in its substantive and procedural aspects. The goal must be to arrive at conclusions and recommendations as guides to future antitrust policy.

The Committee has adopted two major premises. One is that a fair and effective antitrust policy is an indispensable non-partisan article of faith of our political and economic democracy. The other is that private competitive enterprise is that form of economic organization we choose as our own.

The Committee is in harmony with the goal specified by the Attorney General, namely, an "uncompromising determination that there shall be no slackening of effect to protect free enterprise against monopoly or unfair competition."

The Committee is composed of 60 members including teachers of law and economics, as well as practising lawyers, men who counsel all sizes of business enterprises.

For study purposes the antitrust field has been broken up into six major areas. These include Legal and Economic Concepts of Competition and Monopoly, Distribution, Foreign Commerce, Patents, Administration and Enforcement, and Exemptions. Work groups corresponding to each of these areas have been organized and Committee members assigned to each.

Outlines on study questions have been prepared by each group and members submit drafts of subject matter assigned to them to the group heads who will consolidate these drafts into preliminary area reports. These are then circulated among group members for review and after revisions are made, area reports will be submitted to the Co-Chairmen in March.

In the second stage of work the area reports will be consolidated into preliminary Committee reports by the Co-Chairmen probably by May. This draft will be reviewed by all members for comment. Revised drafts will be circulated to members until the Co-Chairmen determine that all possible common ground has been explored and that reformulation cannot widen the area of agreement.

The initial area reports are only a starting point. The Co-Chairmen have the responsibility of directing all of the steps leading to the Final Report which will take the form of a report to the Attorney General. It will consider the principal antitrust problems setting forth, so far as possible, the issues, relevant statutory provisions, administrative and judicial interpretations, evaluation of pertinent and economic questions, and recommendations.

If any legislative proposals are transmitted to Congress at the suggestion of the Attorney General, each recommendation must travel the laborious road of all proposed legislation.

The Committee is striving for a statement of fundamental anti-trust policy which will have the strength and suppleness of charter provisions in preventing impairment of competition while preserving conditions essential to competitive variety and competitive change.

SHERMAN ACT VIOLATION

United States v. Pan American World Airways, Inc. et al. (Civ. 90-259 - S.D. N.Y.). A civil complaint was filed in the Southern District of New York on January 11, 1954 charging Pan American World Airways, Inc.;

W. R. Grace and Company and Pan American-Grace Airways, Inc., with violating Sections 1, 2 and 3 of the Sherman Act. Pan American and Grace each own one-half of the capital stock of Pan American-Grace Airways, Inc., and the complaint prays that these companies be forced to divest themselves of their interests in Pan American-Grace. It is charged that Pan American-Grace was formed by Pan American and Grace in 1929 and that the purpose in forming this company was to buy up a potential air carrier in Latin America which would have been a competitor with Pan American in the field of air transportation and with Grace in ocean transportation. Since the formation of Pan American-Grace it has been used to prevent the growth of a competitive air transportation system in Latin America. The Department of Justice was requested to bring the suit by the Civil Aeronautics Board because the Board concluded that the corporate interrelationship was beyond the reach of the Board's power under the Civil Aeronautics Act and that the relationships prevent the objectives of the Civil Aeronautics Act from being effectuated.

Staff: Edward R. Kenney, John Guandolo and Frank F. Vesper
(Antitrust Division)

PARTIAL DISSOLUTION ORDERED

United States v. The New York Great Atlantic & Pacific Tea Company, Inc., et al. (Civ. 52-139 - S.D. N.Y.). This case was terminated January 19, 1954 by the entry of a consent judgment.

The Government's complaint, which had been filed in 1949, charged the defendants with having combined and conspired to restrain and monopolize a substantial portion of the retail sale and distribution of food and food products in the United States. The civil suit was a sequel to the Government's criminal case in Danville, Illinois in 1945-46 in which the defendants had been found guilty of substantially the same charges and fined \$175,000.

The core of the alleged combination and conspiracy was the alleged inconsistent activities of Atlantic Commission Company. This company, it was alleged, acted simultaneously as selling broker for food suppliers who were trying to sell to both A&P and its retail competitors and, at the same time, also acted as buying agent for A&P which was attempting to purchase at the lowest possible prices from the same suppliers. The Final Judgment terminating these proceedings provides that steps are to be commenced at once to dissolve Atlantic Commission Company. It further provides that, so long as A&P engaged in the retail sale or distribution of food and food products it may neither act as a buying agent nor broker for the outside trade, nor, in fact, sell any food or food products to the outside trade with the exception of salvage sales and products which are manufactured or processed by A&P itself. The effect of this provision is to limit the activities of A&P's buying divisions and subsidiaries to the purchase of food and food products for A&P only.

The Final Judgment reserves to A&P its right to manufacture and process food and food products and to sell such products to the outside trade, subject however, to the limitation that such sales must be made to

the outside trade at prices which are no higher and on terms which are no less favorable than those at which A&P sells the same products to its own retailing subsidiaries.

Among the alleged practices of A&P was the abuse of its centralized mass buying power. It was alleged that A&P had used this enormous power to extract from suppliers secret and preferential discounts and allowances over and above those normally available to A&P's retail competitors. This was accomplished, it was alleged, in part by combining for discount and allowance purposes the total purchases of A&P's 37 units, each of which consists of 100 or more stores. The Final Judgment prohibits A&P from knowingly accepting from any supplier any discount or allowance based upon the combined purchases of more than one unit and forbids A&P to merge any two or more of its units for the purpose of enabling A&P, through such merger, to qualify for a higher rate of discount or allowance. With respect to the alleged below-cost sales of A&P and its recoupment of losses through sales at higher prices in non-competitive areas, the Final Judgment enjoins the defendants from assigning or approving for any of its divisions a gross profit rate with knowledge that such profit rate will result in the operation of such division at a loss for the purpose of eliminating competition.

In addition the Final Judgment contains numerous injunctive provisions directed at specific activities in which A&P was alleged to have engaged at the expense of its retailing competitors.

Staff: William D. Kilgore, Jr., Harry N. Burgess, Richard O'Donnell and Elmo Flynt (Antitrust Division, New York Office.)

OPINION UNDER RULE 34

United States v. The Procter & Gamble Company, et al. (Civ. 1196-52 - D. N.J.). On January 14, 1954, Judge Modarelli rendered an opinion denying two motions in which the defendant The Procter & Gamble Company sought orders which would prevent the Government from using in this civil proceeding evidence obtained through grand jury subpoena, and which would require the Government to deliver to The Procter & Gamble Company all copies of, excerpts from, and notes, analyses, summaries, and other writings concerning documents which were obtained from said defendant by grand jury subpoena.

Judge Modarelli had earlier, in an opinion rendered May 11, 1953, rejected the same defendant's contention that documents originally obtained by grand jury subpoena cannot be used in a subsequent civil action, and granted a Government motion for the production pursuant to Rule 34 of documents originally thus obtained which had been returned to the defendant after the grand jury had terminated.

Staff: Walker Smith, Norman J. Futor, Robert Brown, Jr., and Estella L. Baldwin (Antitrust Division.)

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

MEMBERS OF THE ARMED FORCES AS WITNESSES

It is becoming increasingly difficult and in most instances impossible to secure the return of military personnel from overseas to testify in the average case. The Army is under pressure to reduce temporary duty travel and with the difficulty in replacing the personnel strict regulations have been issued prohibiting the return of military witnesses. Criminal matters involving capital punishment and tort actions for extremely large sums are the only cases to which the Army will give consideration. We are forced to depend upon depositions or postponements of cases in the less important type of court action.

The United States Attorney should keep in touch with military witnesses that may be reassigned. It is much easier to have a "60-day hold" placed on a serviceman than it is to have him returned from overseas. The office of the Administrative Assistant Attorney General will be glad to assist in locating witnesses whose addresses are not definitely known.

PETITIONS FOR REVIEW OF ORDERS OF REFEREES IN BANKRUPTCY

The Judicial Conference has specifically excluded the United States from payment of the \$10 filing fee to accompany petitions for review of orders of referees in bankruptcy. (Manual, Title 6, p. 13). Please note your Manual accordingly. The new fee provision reads:

"For filing petitions for review and for filing petitions for reclamation of property, \$10 for each petition filed, to be paid at the time of filing by the petitioner, provided that no charge shall be made for petitions for review or for reclamation of property filed on behalf of the United States."

COURT REPORTING RATES

Effective June 1, 1953, ordinary transcript rates in the northern district of Alabama have been increased to 55¢ per page for original and 25¢ per page for each copy. Please note your Manual accordingly, Title 8, p. 138.

Deductions from W.A.E. Per Diem Compensation. Withholding tax, and retirement or F.I.C.A. in the alternative, are to be deducted in accordance with present pay tables, and the instructions on the fan-fold. If the employee has previously been subject to the retirement law, retirement deductions will be continued; otherwise, F.I.C.A. deductions will be made.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Argyle R. Mackey

SUBPOENAS

Authority to Issue Subpoenas Against Naturalized Citizen in Investigation of Propriety of His Naturalization. In re Oddo (S.D. N.Y.). The Bulletin for December 11, 1953 (p. 18) discussed the conflicting decisions of two United States District Courts as to the authority of immigration officials to issue subpoenas against naturalized citizens. The disputed statutory language is new in Section 235(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1225(a). On December 30, 1953 Judge Edward Weinfeld of the United States District Court for the Southern District of New York ruled that immigration officers lacked authority to issue such subpoenas, thus agreeing with the decision of Judge Foley of the Northern District of New York in Application of Barnes, 116 F. Supp. 464. Judge Weinfeld's decision is contrary, however, to that of Judge Welsh of the Eastern District of Pennsylvania in Matter of Minker. Consideration is being given to the advisability of appeal.

Staff: Assistant United States Attorney Harold J. Raby (S.D.N.Y.)
Lester Friedman, Immigration and Naturalization Service
(N.Y.)

CRIMINAL VIOLATIONS

Alien Found in the United States After Previous Deportation. United States v. Milton Leroy Connor (S.D. N.Y.). Connor entered the United States illegally in 1946 and at the time of his apprehension the statute of limitations barred prosecution based on the original illegal entry. However, a new provision in Section 276 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1326, established criminal sanctions directed against any alien who "is at any time found in, the United States" after having previously been deported. It is the administrative view that this statute establishes an entirely independent offense of presently being found in the United States unlawfully. Connor was indicted under Section 276 of the Immigration and Nationality Act as having been found unlawfully in the United States. He pleaded guilty December 21, 1953 and on that date Judge David M. Edelstein imposed a two year sentence upon the defendant and recommended that he be deported since his term of imprisonment had been completed. It is believed that this is one of the first convictions obtained under the new statute.

DETENTION OF DEPORTABLE ALIENS

Authority of Attorney General to Detain Alien Beyond Six Month Period Following Order of Deportation. Cefalu v. Shaughnessy (S.D. N.Y.). Section 242(c) and (d) of the Immigration and Nationality Act, 8 U.S.C. 1252(c) and (d) authorize the Attorney General to detain an alien for a period of six months following the issuance of an order of deportation. An order for the deportation of Cefalu was issued April 30, 1953. However, the actual expulsion was deferred because

the alien's counsel obtained the issuance of writs of habeas corpus ad testificandum to require his production as a witness upon the trial of a criminal proceeding. Upon the expiration of the six month period Cefalu sought release in habeas corpus. The Government insisted that it was prepared to deport Cefalu but that execution of the deportation order had been prevented by the habeas corpus writs obtained on Cefalu's behalf. On January 4, 1954 Judge Irving R. Kaufman of the United States District Court for the Southern District of New York dismissed the writ of habeas corpus, finding that "Congress clearly intended that the Attorney General have six unhampered months within which to effect deportation."

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OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Effect of Federal "Freezing" Order on Assignment of Foreign-Owned Property - Denial of Summary Judgment Where Both Parties Move. - F.A.R. Liquidating Corp. v. Brownell (C.A. 3). Plaintiff, a Delaware corporation, brought suit under Section 9(a) of the Trading with the Enemy Act to recover 111 patents in the television field which the Alien Property Custodian had vested in 1942 as the property of a German corporation.

Plaintiff's claim to the patents was based on allegations that it had acquired the patents pursuant to an assignment agreement consummated with the German corporation on or before 1:10 p.m., June 14, 1941. At 1:10 p.m. the Federal foreign funds "freezing" controls were extended to German-owned property in the United States and thereby prohibited transactions involving such property without a license from the Treasury Department.

The Attorney General's answer placed in issue whether an agreement had been reached on or before that date. Plaintiff moved for summary judgment, claiming that on the correspondence between itself and the German corporation there was consummated a contract upon the deposit by the German corporation of an acceptance cable prior to 1:10 p.m. on June 14, 1941. The Attorney General cross-moved for summary judgment. To establish that the acceptance cable was deposited before 1:10 p.m. plaintiff submitted, in affidavit form, the opinion of a communications expert.

The District Court granted plaintiff's motion and denied the Attorney General's. The Court held that the correspondence was unambiguous and interpreted the correspondence as showing that a binding agreement came into being on June 14, 1941, when the German corporation deposited its acceptance with the German cable office, and that the opinion of the expert as to the time of sending the cable resolved the issue against the Government. F.A.R. Liquidating Corp. v. McGranery, 110 F. Supp. 580 (D. Del.).

On appeal the Court of Appeals for the Third Circuit reversed and remanded. In an opinion filed January 13, 1954 (Kalodner, Circuit Judge), the Court, while agreeing with the District Court's construction of the correspondence, held that summary judgment was erroneous because an issue of fact was raised as to the time the acceptance cable was sent. It was of the view that the opinion contained in the affidavit of the expert was insufficient to discharge plaintiff's burden of showing the absence of a genuine issue of fact. The Court further held that the Attorney General's cross-motion for summary judgment did not foreclose him from questioning the propriety of disposing of the case by way of summary judgment in plaintiff's favor.

Staff: Leonard G. Hagner, United States Attorney, (Delaware)
James D. Hill, George B. Searls, Irwin A. Seibel
(Office of Alien Property)

Trading with the Enemy Act - Unlicensed Transfers of Blocked Property. Schumacher, Trustee v. Brownell (C.A. 3). Plaintiff sued under Section 9(a) of the Act to recover a fund vested by the Alien Property Custodian as the property of the Kyffhaeuser, League of German War Veterans in the U.S.A. The Kyffhaeuser voted to dissolve on February 1, 1942, and at the same time voted to assign the fund to plaintiff, its National Commander, as trustee. The transfer was not licensed by the Secretary of the Treasury under Executive Order No. 8389, but the complaint alleged that the dissolution and the vote assigning the fund were passed at the "instructions" of the Department of Justice, that the Department had "waived" the requirement of a license under 8389, and that the transaction had been reported to the Departments of State, Justice and Treasury and approved by them. The District Court dismissed the complaint and the Court of Appeals in an opinion by Kalodner, C.J. filed January 26, 1954, affirmed. The court held that the general advice to dissolve given the Kyffhaeuser by the Department of Justice did not amount to an authorization of the transfer of the funds, and that in any event in 1942, the Department of Justice had no authority to administer Executive Order No. 8389, and could not waive its requirements. It also held that the Executive Order put the burden on the parties to a transaction of getting a license and that the burden was not on the Government to register disapproval of a prohibited transaction which was reported to it. On the facts alleged, no approval of the transaction was shown. The transaction not being licensed under the Executive Order was void and conveyed no interest to the plaintiff.

Staff: United States Attorney W. Wilson White (E.D. Pa.)
James D. Hill and George B. Searls, (Office of Alien Property).

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