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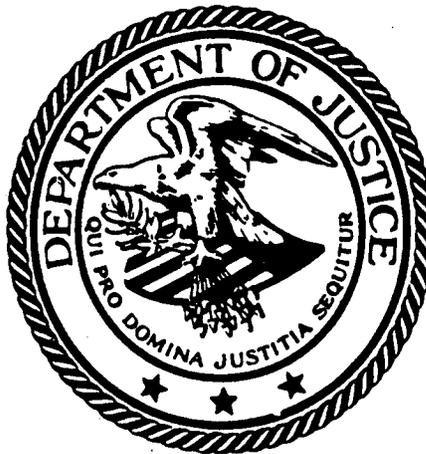
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United States
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Vol. 2

No. 18



UNITED STATES ATTORNEYS
BULLETIN

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UNITED STATES ATTORNEYS BULLETIN

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NEW HEAD OF

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS



On August 16, 1954, Attorney General Brownell announced the appointment of Joseph H. Lesh as Assistant to Mr. William P. Rogers, the Deputy Attorney General. Mr. Lesh will head the Executive Office for United States Attorneys.

Mr. Lesh was born in Huntington, Indiana, received his law degree from Indiana University in 1932, and became a member of the firm of Lesh and Lesh. He was County Attorney from 1940 to 1942. He was

appointed United States Attorney for the Northern District of Indiana in May of 1953 and entered on duty June 5, 1953.

Mr. Lesh was a naval gunnery officer in both the Pacific and European theaters in World War II. He has been active in the American Legion and the Veterans of Foreign Wars. He also has been active in the Presbyterian Church, Elks Lodge, the Shrine, Sigma Chi Fraternity and other service and social organizations. He is a past president of the Huntington County Bar Association and is a member of the Indiana State Bar Association and the American Bar Association. He is married, and has three children.

During his incumbency as United States Attorney, Mr. Lesh gained a broad and practical knowledge of the problems which confront the United States Attorneys and he can be expected to provide the United States Attorneys with the forceful representation they require for the solution of such problems. In the past year the Executive Office for United States Attorneys has been largely occupied in procuring for the United States Attorneys the equipment and staff necessary for the efficient performance of their duties, as well as initiating various devices such as the litigation control system and the United States Attorneys Bulletin and Manual, all of which are designed to aid in the administration of the United States Attorneys' offices.

Mr. Lesh contemplates adding new and additional responsibilities to the office, all calculated to be of assistance to United States Attorneys. He stated: "Solving problems for United States Attorneys will be our principal aim. We will welcome suggestions."

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IMPORTANT NOTICE

FOR ALL UNITED STATES ATTORNEYS

There will be a Conference of United States Attorneys in Washington, D. C. on October 13, 14, and 15, 1954. In order to insure your attendance at the Conference, will you please arrange your future schedules so that these dates will be free. An agenda for the meeting is now in the course of preparation and you are invited to submit suggestions as to topics which you would like to have discussed and which would be of general interest.

While in Washington, some United States Attorneys may wish to confer with Departmental personnel on pending cases or other matters. In order that arrangements may be made for such conferences, and as many United States Attorneys accommodated as possible, the Executive Office for United States Attorneys should be advised as soon as possible of the probable date of your arrival in Washington, the names of the individuals with whom you wish to confer, the titles of the cases, or nature of the matters you wish to discuss, and the approximate amount of time you estimate will be required for such discussion.

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ACTING HEAD LEAVES DEPARTMENT

On August 31, 1954, Mr. Christian R. Kennell, Acting Chief of the Executive Office for United States Attorneys, left the Department of Justice after 25 years' service to enter private industry. Mr. Kennell made many friends among the United States Attorneys during his tenure as Acting Chief by reason of his earnest endeavors to further the interests of the Department's legal representatives in the field. The Department joins Mr. Kennell's many friends in wishing him every success in his new venture.

* * *

JOB WELL DONE

Assistant United States Attorney Irvine F. Belser, Jr., Eastern District of South Carolina, has received letters of commendation from the Regional Counsel and Regional Commissioner of the Internal Revenue Service, the Vice President of the Great Northern Railway Company, and from Assistant Attorney General, H. Brian Holland, for his work in preparing and presenting a recent criminal tax prosecution which involved a number of intricate problems and for bringing such prosecution to a successful conclusion.

United States Attorney Frank D. McSherry, Eastern District of Oklahoma, and his Assistant, Harry G. Fender, were recently commended by the Director of the Alcohol and Tobacco Tax Division of the Treasury Department, for their very able and highly effective work in a recent prosecution in which the Government prevailed.

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I N T E R N A L S E C U R I T Y D I V I S I O N

Assistant Attorney General William F. Tompkins

SUBVERSIVE ACTIVITIES

Smith Act - Conspiracy to Violate. United States v. Arthur Bary, et al., (D. Colorado). On August 1 and 2, the Federal Bureau of Investigation arrested Arthur Bary, Anna Bary, Harold Zepelin, Patricia Blau, Lewis Martin Johnson, Maia Scherrer and Joseph Sherrer for conspiring to advocate the overthrow of the Government by force and violence in violation of 18 U.S.C. 371 and 2385. An indictment was returned by a Federal Grand Jury at Denver, Colorado on August 9, 1954, charging the above-mentioned individuals with conspiracy to violate the Smith Act. This case brings to 119 the number of Communist Party leaders who have been indicted for conspiring to violate the Smith Act. Eighty-one of such defendants have already been convicted.

Staff: Assistant Attorney General William F. Tompkins, United States Attorney Donald E. Kelley (D.Colo.), William F. O'Donnell, III and B. Franklin Taylor, Subversive Activities Section, Internal Security Division.

Smith Act - Conspiracy to Violate. United States v. Kuzma, et al., (E.D. Pa.). Nine leaders of the Communist Party were convicted on August 13, 1954, of violating 18 U.S.C. 371 by conspiring to violate 18 U.S.C. 2385. The trial began on March 22, 1954. The indictment charged the defendants with conspiring to teach and advocate the overthrow and destruction of the Government by force and violence as speedily as circumstances would permit, and to organize and help to organize the Communist Party, USA as a group to so teach and advocate.

No date has been fixed for the sentencing of the defendants.

This case represents the successful completion of ten Smith Act trials against Communist Party leaders since 1948. Under this program, 119 Communist Party leaders have been indicted for conspiring to violate the Smith Act, and, thus far, there have been eighty-one convictions.

Staff: United States Attorney W. Wilson White and Thomas J. Mitchell, James A. Cronin and Bernard V. McCusty of the Subversive Activities Section, Internal Security Division.

* * *

CRIMINAL DIVISION

Assistant Attorney General Warren Olney III

RECEIVING STOLEN GOODS

Evidence - Admissibility of Prior Statements. Alex Michael Goldberg v. United States (C.A. 4). On June 26, 1954, the Court of Appeals for the Fourth Circuit affirmed the judgment of conviction in this case. Appellant had been found guilty of receiving stolen goods under 18 U.S.C. 641 and had received a sentence of 8 years and a fine of \$5,000 and costs with commitment. Over 100,000 radio tubes with a cost value of nearly \$100,000 to the Government and a retail value approximating \$300,000 were stolen from the Baltimore Signal Depot, Baltimore, Maryland, and received by Goldberg, a Baltimore surplus electronics dealer. Appellant sold the tubes to New York and Philadelphia dealers, making a profit of \$27,000 in the first ten months of 1952, during which period his activities were the greatest. Prior to appellant's conviction, the five thieves, all Government employees at the Depot, had been convicted and given sentences ranging from four to six years in prison. The tubes were received from the thieves by one Isadore Harry Goldstick, a record dealer and television and radio technician, at his record shop in Baltimore and then carried to appellant's store nearby, where they were processed for sale.

On appeal, counsel for appellant virtually admitted there was "sufficient evidence to take to the jury the question of appellant's guilty knowledge". Appellant contended inter alia that the admission into evidence of two unsworn written statements of the defendant and witness Goldstick, constituted prejudicial error. The first statement was given to the FBI by the witness, Goldstick, on October 9, 1952, the day of his arrest. On direct examination Goldstick freely admitted that this statement was false. The second statement was made to the FBI by Goldstick, upon advice of counsel, on December 2, 1952, after he had decided to plead guilty in his own case.

Many cases were cited by appellant Goldberg in support of the rule that prior statements made by a witness are inadmissible to corroborate his testimony given on the stand. However, the court was of the opinion that like most general rules, its practical application must be qualified by the circumstances of each case, and that modern courts seemed to manifest a tendency to restrict the rigid and inelastic application of the rule. The court held the admission of such statements for purposes of corroboration was largely in the discretion of the trial court, citing Beaty v. United States, 203 F. 2d 652, 656, wherein the court in admitting the statement of a witness to a Chief of Police said "prior statements are not like ordinary hearsay. The one who made them is before the jury and is subject to cross examination about them, and the jury is perfectly well able to judge whether they do or do not corroborate him".

The witness, Goldstick, had received a sentence of 8 years and was fined \$5,000 and costs, with commitment, prior to his testifying against appellant in either of the two trials of the appellant. In the first trial of appellant there was a hung jury, eleven jurors voting for conviction and one for acquittal. In the second trial the jury's unanimous verdict was rendered in less than an hour.

Staff: Case tried and argued on appeal by Assistant United States Attorney Herbert H. Hubbard (D. Md.)

MOTION TO VACATE JUDGMENT AND SENTENCE
28 U.S.C. 2255

Plea of Guilty - Presence of Appellant Unnecessary at Hearing Where Record Shows He Was Not Entitled to Relief. William H. Jackson v. United States (CA 4, decided 7-8-54). The Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court of Maryland denying appellant's motion to vacate judgment and sentence entered upon his plea of guilty to an indictment charging him with forging a Government check in violation of 18 U.S.C. 495. Appellant complained that he was questioned by Government agents for a long time while under arrest, and that he admitted his guilt because of the lengthy questioning and because he was told that he would receive a lighter punishment if he confessed. The Court stated that since appellant was represented by counsel of his own choice at the time he entered his plea he may not plead ignorance and ask relief from the sentence imposed because it was greater than he expected. The Court further held that appellant's request that he be present at the hearing on his motion to vacate was properly denied "when the facts showing that appellant was not entitled to the relief asked by his motion clearly appeared of record".

Staff: Herbert H. Hubbard, Assistant United States Attorney (D. Md.)

Plea of Guilty. Milton Bloombaum v. United States (CA 4, decided 4-5-54). The judgment of the District Court of Maryland denying appellant's motion under 28 U.S.C. 2255 to vacate a sentence imposed on a plea of guilty to an indictment charging him with acquiring marihuana in violation of law was affirmed by the Court of Appeals for the Fourth Circuit. The Court found that since appellant was represented by counsel of his own choice and voluntarily entered his plea of guilty, he could not thereafter attack the sentence on the ground that he was not in fact guilty as charged since a voluntary plea of guilty is an admission of guilt and a waiver of all nonjurisdictional defects. The Court stated that relief under 28 U.S.C. 2255 may be granted only where it appears that the judgment was rendered without jurisdiction, or that the sentence

imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack.

In another case (Edward A. Russell v. United States) involving a motion to vacate a sentence imposed on a plea of guilty, the Fourth Circuit Court of Appeals also held that where appellant voluntarily pleaded guilty to an indictment he could not later controvert his guilt as established by that plea.

Staff: Both appeals argued by Assistant United States Attorney Herbert H. Hubbard (D. Md.)

SALE OF PUBLIC OFFICE

Payment for Appointment to Job As Rural Mail Carrier. United States v. Anthony J. Marro, et al. (W.D. N.Y.). On August 3, 1954, Anthony J. Marro, Chairman, and Joseph J. DeLuca, former committeeman of the Democratic Committee of the town of Galen, New York, were indicted for violation of 18 U.S.C. 215. The indictment charged defendants with soliciting and receiving money in the sum of \$875 from Vivian T. DeLeo, in connection with DeLeo's appointment as a rural mail carrier at Clyde, New York, in 1951.

Staff: Assistant United States Attorney Donald F. Potter (W.D. N.Y.).

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C I V I L D I V I S I O N

Assistant Attorney General Warren E. Burger

D I S T R I C T C O U R TS O L D I E R S ' A N D S A I L O R S ' C I V I L R E L I E F A C T

Government Held Without Right of Indemnity Against Former Serviceman for Sums Expended by It in Protecting His Commercial Life Insurance Policy from Lapse. United States v. Irwin Pincy Hendler (D. Colo., Civil Action No. 4418, August 11, 1954). The United States brought suit to recover from defendant the sum of \$525.05 which it had paid for the protection of defendant's commercial insurance policy under Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, pursuant to an application submitted prior to the 1942 Amendment to that Act which specifically made the sums paid a debt due the United States from the insured. In dismissing the Government's complaint the court held that the theory of United States v. Nichols, et al., 105 F. Supp. 543 (N.D. Iowa), appeals dismissed, 202 F. 2d 956, 958 (C.A. 8), that under common law principles the insured was required to indemnify the United States for the commercial insurance premiums paid for by it, was rendered unavailable by the rationale of United States v. Gilman, 347 U.S. 507. In the Gilman case the Supreme Court refused to imply a right of indemnity on the part of the Government against a Federal employee, whose negligence had resulted in the Government's liability under the Tort Claims Act, in the absence of specific provision therefor by Congress. Other cases favoring the Government's recovery on facts like those of the instant case are Morton v. United States, 113 F. Supp. 496 (E.D. N.Y.), appeal dismissed January 8, 1954, and Plesha v. United States (N.D. Calif.), appeal pending. The Solicitor General has recently authorized an appeal from an adverse decision on the same basic issue in Hormel v. United States (S.D. N.Y.). The Government's right to as much as \$2,000,000 may be controlled by the ultimate disposition of these cases. Salesmen of certain insurance companies sold many policies of insurance to men anticipating military service, on the representation that such insurance was free under the provisions of the Soldiers' and Sailors' Civil Relief Act after the payment of the initial premium. See Nichols v. United States, *supra*, and Berenbeim v. United States, 164 F. 2d 679 (C.A. 10), certiorari denied, 337 U. S. 827.

Staff: Assistant United States Attorney Robert D. Inman
(D. Colo.) and Ellen C. McDonald (Civil Division)

F. H. A. HOME IMPROVEMENT LOAN

Suit by Government as Holder in Due Course - Inability to Implead Original Payee. United States v. Edward and Rose Dobrowolski v. Guy E. Henderson, t/a Eastern Sheet Metal and Roofing Company. (Civil No. 7248, D. Md., July 6, 1954). The Government brought suit against the Dobrowolskis on an F.H.A. Title I home improvement promissory note. The

note had been transferred by the contractor-payee to the bank -- a holder in due course -- which in turn had transferred it to the Government. The Dobrowolskis contended that the contractor had been guilty of certain improprieties and moved the court for permission to join him as a third party defendant alleging that they have "causes of action growing out of the transaction for which the note was given, and [the contractor] may be liable jointly to the defendants and third-party plaintiffs, or to the plaintiff, for all or part of the latter's claim against [them] * * *". This motion was granted whereupon the contractor moved to dismiss the third-party complaint for want of jurisdiction.

The District Court construed Rule 14(a) of the Federal Rules of Civil Procedure as not being intended for use as a means to try, in the same proceeding, two separate and distinct causes of action, and that since neither the bank nor the Government had been a party to any fraud or illegality, the Government was in the position of a holder in due course and was not a party to the contract. The Court held further that it had the discretion to deny the interpleading of a third-party defendant if, as here, it would introduce a controversy unrelated to the Government's claim and would unduly complicate the case, to the Government's prejudice. The Court distinguished the case of United States v. Pryor, 2 F.R.D. 382.

Staff: Assistant United States Attorney Herbert H. Hubbard,
(D. Md.).

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ANTITRUST DIVISION

Assistant Attorney General Stanley N. Barnes

JUDICIAL REVIEW OF ADMINISTRATIVE ORDER

Southern Bakers Association, Inc. et al. v. United States of America, et al. (Civil Action No. 4826, N.D. Ga.). This was an action to set aside, annul and suspend an order of the Interstate Commerce Commission increasing the railroad rates on grain from Kansas and Oklahoma to the South. The plaintiff in not submitting the evidence before the Commission to the Court based its opposition on the question that the findings of the Commission in its report did not substantiate its conclusions. No attempt was made to challenge the substantiality of the evidence supporting the findings. The plaintiffs also charged the Commission did not follow the statutory requirements of Section 15(a)(2) of the Interstate Commerce Act in the prescription of higher rates and that contrary to the requirements of the Administrative Procedure Act, the Commission had failed to publish notice of the proceeding in the Federal Register.

The 3-judge court found that there was nothing before them to indicate that the Commission had not observed the statutory requirements of Section 15(a)(2) of the Act, and also stated that where the relief sought by a complaint was an order directed against the defendant rail carriers who were served and answered, the Administrative Procedure Act does not require the publication of notice since this proceeding comes within the exception to Provision 4(a) of that Act. The Court found that the findings supported the order of the Commission and dismissed the complaint.

Staff: Willard R. Memler (Antitrust Division)

SHERMAN ACT

United States v. Inland Coca-Cola Bottling Company, et al. (Criminal Action No. 3450, D. Idaho). On August 25, 1954 the grand jury at Boise, Idaho returned a one-count indictment charging the principal soft drink bottlers in the Boise Valley area with violating Section 1 of the Sherman Act by engaging in a combination and conspiracy to eliminate and suppress competition in the sale and distribution of soft drinks. The Boise Valley area comprises parts of the States of Washington, Idaho and Oregon. Other soft drink bottlers selling in that market were named as co-conspirators but not as defendants.

The indictment alleges that the defendants and co-conspirators agreed to fix prices on soft drinks, to set uniform charges for the sale or lease of soft drink vending machines and equipment, and to require identical bottle and case deposits. It asserts that the conspiracy resulted in increasing the prices of soft drinks, in suppressing competition among the defendants, and in reducing the amount of ingredients and supplies purchased by the defendants in

interstate commerce for use in the bottling, selling and distributing of soft drinks.

Staff: Edward M. Feeney, John Waters, Gerald F. McLaughlin
(Antitrust Division, Seattle Office)

United States v. Seafarers Sea Chest Corporation, et al. (Civil 1467, E.D. N.Y.). On August 20, 1954 a complaint was filed in the Federal District Court at Brooklyn, New York, charging Seafarers Sea Chest Corporation and Seafarers International Union of North America, A.F.L., Atlantic and Gulf District, with conspiring to restrain and monopolize and with monopolizing and attempting to monopolize the business of supplying so-called slop chests to vessels sailing from the Atlantic coast and the Gulf of Mexico. Slop chest is the historic name for a ship's store which carries such articles as clothing, tobacco and seamen's gear, which the seamen may purchase in the course of a voyage.

This complaint, brought under Sections 1 and 2 of the Sherman Act, charges that the defendants have compelled vessel owners to obtain their supplies in all Atlantic and Gulf ports from the defendant Corporation and to refuse to purchase from other dealers who offer supplies on a competitive basis. As a result many former suppliers have been excluded from the business of furnishing slop chest supplies to these vessels.

The Government's complaint seeks the immediate dissolution of the defendant Corporation, a business organized, owned and managed by the defendant Union, and injunctive relief against the exclusive dealing practices and the monopolistic practices of the corporation and union in furnishing slop chest supplies for seamen on board foreign bound, American flag merchant marine vessels.

Staff: Richard B. O'Donnell, John D. Swartz, Daniel B. Britt,
and Louis Perlmutter (Antitrust Division)

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TAX DIVISION

Assistant Attorney General H. Brian Holland

TAX LEGISLATION

The Internal Revenue Code of 1954, which represents a new codification of all internal revenue laws and which embodies many revisions in existing law, was signed by President Eisenhower on August 16, 1954, and is now Public Law 591, 83d Congress.

The President has also signed enactments which became Public Laws 538 and 559. The former empowers the Supreme Court to prescribe uniform rules for the filing of petitions, preparation of records and the practice and procedure in the Courts of Appeals in proceedings reviewing decisions of the Tax Court. The latter removes the \$10,000 limit in tax refund suits against the United States where the Collector is still in office and also permits jury trials in such suits.

Your attention is invited to the provisions of these laws, when applicable, in conducting tax litigation under your jurisdiction.

The Tax Division is engaged in revising its portion of the United States Attorneys Manual to include changes made necessary by the new legislation and the revision will be transmitted to United States Attorneys as soon as possible.

IMPORTANT CHANGES IN PROCEDURES IN LIEN CASES

Changes in procedure taking place in the Internal Revenue Service will have an effect on the handling of correspondence in lien cases in United States Attorneys' offices. Where the United States has been made a party defendant pursuant to 28 U.S.C. 2410, the Tax Division forwards a copy of the form letter sent to United States Attorneys to the Chief Counsel for the Internal Revenue Service, with the request that the United States Attorney involved be furnished with the necessary and pertinent tax data. At the same time, United States Attorneys are authorized to apply for this data directly, if such course seems advisable.

In the past, the Chief Counsel has requested the appropriate District Director to furnish one set of this data to the United States Attorney and two sets to the Chief Counsel. The Chief Counsel, in turn, forwards one of these to the Tax Division.

At present, the procedure is for the District Director to furnish the United States Attorney with two copies of the data. It is therefore requested that one of these copies be sent to the Tax Division together with the pleadings filed or proposed to be filed on behalf of

the United States. When requesting data directly from the District Director, two copies should be obtained so that the above may be carried out. This will effect certain economies: (1) it will eliminate the necessity of the Chief Counsel forwarding the data and (2) by sending the data together with the responsive pleading to the Tax Division, only one, instead of two, pieces of correspondence need be processed and the time-consuming practice of "matching-up" data and pleadings will be obviated.

CIVIL TAX MATTERS

Appellate Decisions

Death of Partner - Partnership Earnings Until Date of Death Held Taxable to Estate and Not to Decedent. Commissioner v. Estate of Tyree (C.A. 10th), July 17, 1954. Deceased was a member of a partnership engaged in the practice of medicine. The partnership agreement provided that the partnership need not be dissolved on the death of a partner, but could be continued by the surviving partners who were required to liquidate the interests of the deceased partner. Decedent died on August 21, 1946. After the termination of the partnership's fiscal year on February 28, 1947, the partnership paid to decedent's estate his distributive share of partnership earnings earned until the date of his death.

The Commissioner contended that the payment to the estate represented income which should have been included in the decedent's final return. The Court of Appeals, affirming the Tax Court, held that the income was taxable to the estate, and pointed to Code Section 126 (a)(1). Although the contrary conclusion was reached in Commissioner v. Waldman's Estate, 196 F. 2d 83 (C.A. 2d), the decision here follows Henderson's Estate v. Commissioner, 155 F. 2d 310 (C.A. 5th); Girard Trust Co. v. United States, 182 F. 2d 921 (C.A. 3d); and Commissioner v. Mnookin's Estate, 184 F. 2d 89 (C.A. 8th). For future taxable years, Section 706 (c) of the Internal Revenue Code of 1954 expressly provides that, if a partnership is not terminated by death, the partnership taxable year will not close with the death of a partner, so that, in harmony with the present case, the decedent's distributive share of income with respect to a partnership year closing after his death will be taxed to the estate and will not be included in the decedent's final return.

Staff: Ellis N. Slack and Morton K. Rothschild
(Tax Division)

Accrual of Expenses - Vacation Pay Under Union Contract--Cost of Catalog as Business Expenses or Capital Expenditures. E. H. Sheldon & Co. v. Commissioner (C.A. 6th), July 27, 1954. Taxpayer, which reported its income on the accrual, calendar year basis, entered into a

contract with a labor union effective May 1, 1945, through April 30, 1946, in which, among other things, provision was made for vacations with pay for persons who were employed on May 1, the length of the vacation being determined by the length of an employee's service. The contract was renewable unless one party or the other gave 60 days' notice to the contrary prior to April 30.

In 1945, in addition to deducting the amount expended for vacation payments that year, the taxpayer attempted to deduct as an accrued expense two-thirds of the amount of vacation pay which it estimated would be paid in 1946. The Tax Court, upholding the Commissioner, ruled that the latter deduction was not a proper one and the Court of Appeals affirmed. In holding that the estimated expense was not properly accruable in 1945, the Court of Appeals emphasized that at the close of 1945 there was no contract obligation covering 1946 vacations since the existing contract would expire in April of 1946, and since it could not be known in 1945 whether that contract would be renewed. The reasonable probability that the contract would be renewed did not permit an accrual of the liability and, although the contract was in fact renewed prior to the time when the 1945 return was prepared, the Court held that the situation existing at the close of the taxable year was controlling.

The taxpayer also attempted to deduct the expenses incurred in connection with the printing and distribution of a catalog showing the laboratory equipment which it manufactured. The Tax Court had disallowed the deduction on the ground that the cost of the catalog represented a capital expenditure amortizable over a useful life of approximately five years. The Court of Appeals reversed on this issue, holding that the expense was like the costs of advertising which are deductible as a current expense even though some benefits are derived in future years as well as in the year of the expenditure.

Staff: I. Henry Kutz (Tax Division)

DISTRICT COURT DECISIONS

Venue in Refund Suits by Corporations Against the United States.
United Merchants and Manufacturers, Inc. v. United States (D.C. M.D. Ga.)
Plaintiff is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business in New York. It brought this suit for the recovery of documentary stamp taxes in the Middle District of Georgia where it is licensed to, and does, business. The United States moved to dismiss pursuant to 28 U.S.C. 1391(c) and 1402(a). Section 1402(a) provides that suits for the recovery of internal revenue taxes may be prosecuted only in the judicial district where the plaintiff resides. Section 1391(c) provides that a corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

The above-emphasized phrase raised the issue in this case as to whether or not it applies to both corporation defendants and corporation plaintiffs, and if it does, whether or not it applies to corporation plaintiffs suing the United States.

The Court, in holding that plaintiff had chosen an improper forum to bring the action, did not follow Freiday v. Cowdin, 83 F. Supp. 516 (D.C. N.Y., 1949), appeal dismissed, 177 F. 2d 1020, or Hadden v. Barrow, Wade, Guthrie & Co., 105 F. Supp. 530 (N.D. Ohio), which cases had held that the residence provisions of Section 1391(c), supra, applied to corporations generally, whether plaintiffs or defendants. Nor did the Court follow Chicago & North Western Ry. Co. v. Davenport, 94 F. Supp. 83 (D.C. Iowa), which has held that "such corporation" in the last clause of Section 1391(c) referred only to defendant corporations.

The Court, in the instant case, concluded that the language of Section 1402(a) permitting suits against the United States "only in the judicial district where the plaintiff resides" referred to residence in only one district and that district was the state of incorporation.

Pursuant to 28 U.S.C. 1406, plaintiff was allowed to transfer the case to the United States District Court for the District of Delaware.

This apparently is the first decided case on this point in a suit by a corporation against the United States.

Staff: United States Attorney Frank O. Evans,
Assistant United States Attorney Jack J.
Gautier (M.D. Ga.) and David W. Richter
(Tax Division).

Payments Received by Retired State Employees from Washington State Retirement Fund as Gifts or Taxable Income. Raymond G. Sharpe and Mabel Sharpe v. United States (DC WD Wash.). On their joint returns for the years 1949-1952, taxpayers included payments made to taxpayer husband from the Washington State Retirement Fund. Said amounts were designated "Basic Service Pension" and "Prior Service Pension". In addition, taxpayer husband received 20¢ a month designated "annuity" and 41¢ "membership service pension". The latter amounts were not in issue.

Taxpayers relied heavily on Dewling v. United States, 101 F. Supp. 892 (C. Cls.) wherein the Court held that an annuity pursuant to Act of Congress in recognition of the exceptional character of services rendered by civilian officials and employees, citizens of the United States engaged between 1904 and 1914 in construction of the Panama Canal, was a gift.

In addition, taxpayers took the position that the Constitution of the State of Washington forbade "Extra Compensation" under Article 2, Section 25--hence, these payments must necessarily have been gifts.

The Court's Memorandum Opinion, dated July 30, 1954, stated that said payments were not gifts and further, that the Court was of the opinion that the State was without authority to make gifts. The Court held that said payments were the result of payments made by taxpayer husband and for services rendered before the effective date of the Retirement Act and services rendered under the Retirement System.

Staff: Allen A. Bowden (Tax Division)

CRIMINAL TAX MATTERS

Larceny and Embezzlement--Status of Proceeds of Wrongful Conversion of Funds as Taxable Income. Marienfeld v. United States, 545 CCH, Par. 9489, July 12, 1954. The Court of Appeals for the Eighth Circuit affirmed the District Court's judgment of conviction for a violation of Section 145(b), Internal Revenue Code, for the year 1946. Taxpayer's defense was that money received by him that year which he did not report was money he embezzled and thus was not his income. Taxpayer sold and converted the by-products from the boning operation of beef and pork carcasses delivered to him by his customer without the latter's knowledge and retained the proceeds. The question was whether this money was taxpayer's or his customer's. The Court distinguished the case from Commissioner v. Wilcox, 327 U.S. 404, which case held that embezzled funds are not income. Apparently the grounds for distinction were that in Wilcox where a bookkeeper collected money for his employer and immediately pocketed it a clear case of embezzlement was present, since the bookkeeper had an immediate legal obligation to pay his employer this money, whereas in the present case the taxpayer's obligation to pay his customer was deferred until he made a report showing the amount due his customer with right of control, use and dominion over the funds until that time. The reasoning seems to be that Wilcox had no income because he had no present right to the alleged gain and had an immediate duty to return the money. The Court concluded that the nature of the taxpayer's possession, dominion over, use of, and freedom to use the funds in question was more synonymous with the situation in Rutkin (wherein Rutkin had allegedly extorted money from one Reinfeld with no prospect of having to return it unless Reinfeld repudiated the extortion, a happening most unlikely in this Court's judgment). The conviction was affirmed on the authority of Rutkin v. United States, 343 U.S. 130.

Staff: United States Attorney Harry Richards, Assistant
United States Attorney W. Francis Murrell (E.D. Mo.)
and Max H. Goldschein, Special Assistant to the
Attorney General.

Improper Accumulation of Surplus--Jury Trial in Section 102 Case. Brewer Chevrolet, Inc., v. Gray (W.D. Ky.). In this case the Commissioner imposed Section 102 surtax on the Corporation in 1947, 1948, 1949 and 1950 in an amount of from \$13,000 to \$21,000 in each year, because the Corporation, which was engaged in the automobile business, invested \$241,000 of its earnings and profits in farm lands and farm equipment and did not distribute any dividends to its shareholders.

The case was tried on August 11, 1954, before a jury. The Court instructed the jury to make a separate verdict for each year and that there could be a purpose to prevent the imposition of the surtax in some years and not in others.

The evidence showed L. F. Brewer, the controlling stockholder, had expressed a desire to own a beautiful farm and that the 666 acres purchased by the Corporation for \$241,000 was the finest farm in Hardin County, Kentucky. The Corporation had not engaged in the business of farming before the farm was purchased.

At the end of the day, the jury reported hopelessly hung. After deliberating about an hour the next morning, it returned a verdict for the plaintiff for 1947 and 1948 amounting to about \$40,000, and for the defendant for 1949 and 1950 amounting to about \$30,000. Thus, the jury appears to have arrived at a compromise of the matter.

Staff: Assistant United States Attorney William Jones
(W.D. Ky.) and Henry L. Spencer (Tax Division).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Judicial Stay of Deportation. United States ex rel Slavko Kane v. Shaughnessy, (D.C.S.D. N.Y.). Relator sought by habeas corpus to gain a stay of deportation pending disposition of his motion to the Board of Immigration Appeals to reconsider his application for discretionary relief. Administrative stay had been denied. The Court held that in the absence of any arbitrary or unreasonable action by the Immigration and Naturalization Service, there was no basis for judicial intervention. The writ was accordingly dismissed.

REVOCAION OF CITIZENSHIP

Effect of Prior Judicial Proceedings. United States v. Harry Renton Bridges, (D.C.N.D. Calif.). Suit under section 338 of the Nationality Act of 1940 was instituted in May, 1949, to cancel a decree of naturalization obtained by Bridges in 1945 on the ground (1) that it was illegally procured in that within the ten-year period preceding the filing of his petition for naturalization he had been, and at the time of his naturalization was, a member of and affiliated with an organization which advised and taught the overthrow of the Government of the United States and that Bridges believed in and supported the principles of said organization (the Communist Party), and (2) that the decree and certificate of naturalization were fraudulently procured in that Bridges concealed his alleged membership in the Communist Party from the naturalization court by falsely representing that he had not been affiliated with and had not been a member of the Communist Party at any time. Because of the pendency of criminal proceedings against Bridges--also involving the procuring of his naturalization--this suit was stayed. The criminal proceedings having been completed, this revocation suit has been reactivated.

Bridges filed a motion to dismiss and a motion to strike contending (1) that the question of whether or not he has been a member of the Communist Party has been previously litigated between the parties to this suit and determined in his (Bridges') favor and is therefore res judicata; (2) that the complaint does not properly charge Bridges with having "illegally procured the certificate of naturalization;" and (3) that the prosecution of the present proceedings is a violation of due process of law to Bridges.

The Court dismissed both motions holding that neither prior judicial nor administrative proceedings rendered the question of his membership res judicata; that the complaint adequately set forth a cause of action; and finally that the various administrative and judicial proceedings in which Bridges was involved, some of which were initiated by Bridges himself, did not constitute such harassment as would be violative of due process.

CITIZENSHIP

Effect of Repatriation Under Section 323, Paragraph One, of the Nationality Act of 1940, as amended. Donald Joseph Reaume v. United States, (D.C.E.D. Mich.). Plaintiff sought a declaratory judgment that he was a citizen of the United States, claiming that when he took an oath of allegiance and was repatriated under the first paragraph of section 323 of the Nationality Act of 1940, following service in the Canadian military forces, he reverted to his original status as a native-born United States citizen and hence was not thereafter amenable to the expatriating provisions of section 404(b) of the Nationality Act as the Immigration and Naturalization Service had held. Section 404(b), now repealed, provided for the expatriation of naturalized citizens following prescribed periods of residence abroad.

The Court declared plaintiff to be a United States citizen, holding that when he was repatriated he reacquired his original status as a native-born United States citizen and hence was not expatriated under section 404(b) as a result of his subsequent residence in Canada. The basis for the Court's finding was the last sentence of a second paragraph of section 323 which was added to the original section in 1946. Although the added paragraph related to an entirely different category of persons, it contained a sentence to the effect that persons repatriated under that "section" should revert to their pre-existing status of citizenship. The Court concluded that use of the word "section" made the sentence applicable to the entire section, including the paragraph under which the plaintiff was repatriated. The Court found further support for its position in section 327 of the Immigration and Nationality Act which currently provides that a person naturalized under section 323 of the Nationality Act "shall have, from and after such naturalization, the status of a native-born, or naturalized, citizen of the United States, which ever status existed in the case of such person prior to the loss of citizenship."

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