

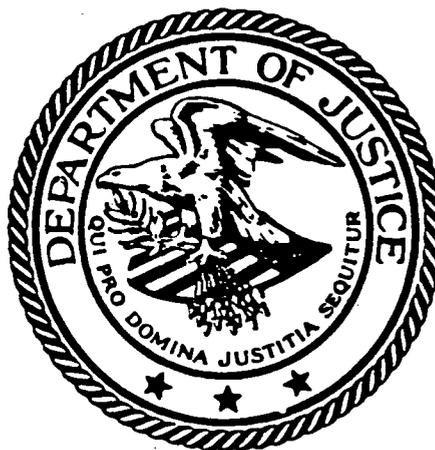
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UNITED STATES ATTORNEYS
BULLETIN

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UNITED STATES ATTORNEYS BULLETIN

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UNAUTHORIZED APPOINTMENTS

United States Attorneys are advised that no further temporary appointments will be made unless the matter of such appointment has been thoroughly presented to the Executive Office for United States Attorneys and a strong justification made for such appointment. The Executive Office has encountered considerable difficulty in obtaining subsequent clearance for many temporary appointments. The authority to make emergency appointments was primarily directed to the smaller offices, as the loss of one Assistant can have a critical effect upon the work where there are only two or three Assistants. In the larger offices, the impact of such a loss is not as great and time is not of the essence in the matter of replacement. For this reason, there would appear to be no basis for making emergency temporary appointments. One of the most serious aspects of this practice of making appointments without prior authorization and justification is that it is in direct contravention of the security policy of the Department which requires security clearance for all candidates for Departmental employment. In this connection, attention is directed to paragraph 2, page 5, Title 8 of the United States Attorneys Manual which directs that no employees must be added to the payroll and no salary payments shall be made until payroll copies of the fanfold form are received from the Department. United States Attorneys are again reminded of their obligation to adhere to this Departmental policy.

* * *

REPORTS OF FINAL ACTIONS

The attention of all United States Attorneys is directed to the instructions set out in paragraph 10, on page 14.04, Title 3 United States Attorneys Manual, which require that where a case has been compromised or closed without prior consultation with the Civil Division a letter or memorandum in duplicate must be forwarded to that Division signed by the United States Attorney or showing his personal approval and reporting the action taken and its basis.

* * *

TRAVEL

In response to requests for clarification of the item appearing in the last issue of the Bulletin concerning prior authorization for travel, it should be pointed out that this item was merely a restatement of instructions appearing in Title 8, page 109 of the United States Attorneys Manual, which require prior authorization for travel other than that within the district or outside the district for appearances before appellate courts.

* * *

REDUCTION OF BACKLOG

A substantial portion of the civil case backlog consists of cases in which the debtors are making installment payments. It is believed that a number of these cases could be removed from the backlog if (1) the suit were dismissed after obtaining leave to reopen the case if the debtor defaults on payments, (2) judgment were obtained through default or confession, or (3) the suit were dismissed and a confession of judgment or similar commitment obtained from the debtor to take effect should he default. The use of these procedures may result in disposing of a number of civil cases now listed in the backlog.

* * *

RISE IN COLLECTIONS

Recent figures show that recoveries by United States Attorneys on FHA claims have increased substantially during the calendar year 1955. Collections during the year totaled \$313,315 more than during the prior year, or an increase of approximately 28%. Of the total recoveries by FHA on Title I loans during the last calendar year, 15.8% were made by United States Attorneys which compares very favorably with the 13.9% figure of 1954. The substantial amount of collections made by United States Attorneys during the year is in sharp contrast to the lower trend indicated for the three previous years when the percentages were 11.5 in 1953, 11.7 in 1952 and 11.9 in 1951.

* * *

FORWARDING LETTERS UNNECESSARY

On Page 1 of the last issue of the Bulletin, the United States Attorneys were advised that no letter of transmittal is necessary in forwarding the weekly report of pending cases. Apparently some United States Attorneys do not make a practice of reading their Bulletin carefully, for letters of transmittal accompanying the weekly reports continue to be received. United States Attorneys are again advised to discontinue such letters so that the time and effort expended thereon may be directed to more necessary matters.

* * *

REPRESENTATION OF STATE OFFICIALS

United States Attorneys and their Assistants are cautioned that they must not represent State officials in any proceeding without prior authorization from the Executive Office for United States Attorneys.

* * *

WEEKLY REPORTS

It is suggested that inasmuch as most United States Attorneys have mimeographing equipment in their offices they arrange to have the forms for their weekly reports mimeographed. No printed forms from the Department are available for this purpose.

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PERSONNEL RECOMMENDATIONS

Form 52 should accompany all personnel recommendations submitted to the Executive Office for United States Attorneys. The submission of this form will expedite materially the processing of such personnel recommendations.

* * *

FORFEITED BAIL BONDS

United States Attorney George R. Blue, Eastern District of Louisiana, has described a procedure he used successfully in a recent forfeiture case.

Upon the failure of John Doe and Richard Roe, defendants, to appear, three bonds totalling \$50,000 were forfeited. One, in the amount of \$20,000, pertained to Doe and the other two, one for \$20,000 and one for \$10,000, pertained to Roe. Roe was the subject of an intense search by the FBI since December 20, 1954, the date of his failure to appear, and a simultaneous search was conducted by the FBI for the other defendant, Doe. Roe was apprehended by the FBI in Denver, Colorado on July 2, 1955, and subsequently removed to New Orleans for disposition. Upon his apprehension and return, attorneys for the surety company filed an application for remission of the \$30,000 forfeited on the two bonds pertaining to Roe.

At the request of United States Attorney Blue, the FBI furnished an estimate of the investigative costs incident to the location and apprehension of Roe, which information was used in opposition to the motion for remission. The FBI estimated that approximately 500 agent days were spent on this investigation in connection with both fugitives, one-half of which were naturally attributed to the search for Roe. The same treatment was given to estimated clerical time of 50 days in this case. Through the use of these figures, the FBI estimated that a total cost of \$12,500 was expended on the investigation and apprehension of Roe.

This information was furnished to the Court in the form of an answer to the motion for a remission, as a result of which the Court entered an order remitting only \$17,500 of the amount forfeited, and obviously used this information furnished by the FBI in its estimate of investigative expenses incurred in the location and apprehension of Roe.

Another factor to be considered in cases of this type is that investigative time is spent to locate a bond defaulter, which time would otherwise have been spent on other important Government matters.

* * *

JOB WELL DONE

The District Engineer for the Sacramento District, Army Engineers, has written to United States Attorney Laughlin E. Waters, Southern District of California, commending Assistant United States Attorney Albert N. Minton for his handling of a recent eminent domain case which involved issues of the greatest complexity and in which the defense was represented by counsel thoroughly experienced in eminent domain proceedings.

The General Counsel of the Department of Agriculture has written to the Department, commending Assistant United States Attorney Fred L. Hartman, Northern District of Texas, for the efficient and diligent manner in which he handled a recent case under the Agricultural Marketing Agreement Act of 1937 which involved serious and complicated questions of law and fact pertaining to a regulatory milk order.

United States Attorney Frederick W. Kaess, Eastern District of Michigan, has written to the Department describing an example of the practical benefits to be obtained through the use of student assistants. Student Assistant William Medlock traced a bank account owned by a judgment debtor, located it in a local bank, garnisheed the bank and was able to receive payment of \$568.49 as a result thereof.

United States Attorney Russell B. Wine, Western District of Texas, reports that Assistant United States Attorneys Holvey B. Williams and William Monroe Kerr have tried a number of cases during the past year, nine of which have been appealed, six have already been affirmed, three are still pending and none have been reversed to date. Two of these cases were the Clinton Jencks case which has been affirmed and the Harvey Matusow case which has been appealed and is still pending. The two latter cases involved internal security matters and were handled in cooperation with personnel of the Internal Security Division.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General William F. Tompkins

SUBVERSIVE ACTIVITIES

False Statement - Affidavit of Non-Communist Union Officer. United States v. Olga Zenchuk (E.D. Mich.). Olga Zenchuk was originally indicted on October 17, 1952, by a federal grand jury in Detroit for violation of 18 U.S.C. 1001. She was charged in two counts with falsely denying membership in and affiliation with the Communist Party in an Affidavit of Non-Communist Union Officer filed with the National Labor Relations Board on October 20, 1949, pursuant to Section 9(h) of the Labor Management Relations Act of 1947. She was arraigned October 20, 1952, and pleaded not guilty. On December 9, 1954, the indictment previously returned was dismissed by the court and Zenchuk was reindicted on the same date by a grand jury in Detroit. She was apprehended in Florida and waived removal to the Eastern District of Michigan, where she entered a plea of not guilty and was continued on bond. On January 20, 1956, Olga Zenchuk appeared in open court and requested permission to withdraw her plea of not guilty to the second count wherein she was charged with falsely denying that she was affiliated with the Communist Party. This motion was granted by the Court and the defendant thereupon entered a plea of guilty to the second count. A motion was made by the government to dismiss the first count charging the defendant with falsely denying membership in the Communist Party with the request that the motion be taken under advisement by the court pending imposition of a sentence. No date was set for sentencing.

Staff: Assistant United States Attorney Dwight K. Hamborsky
(E.D. Mich.), Brandon Alvey and Clinton B. D. Brown
(Internal Security Division)

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C R I M I N A L D I V I S I O N

Assistant Attorney General Warren Olney III

DISMISSALS IN FUGITIVE CASES

A change in the United States Attorneys' Manual, Title 2, page 19, is forthcoming to delete Paragraph (f) which authorized the dismissal of criminal cases where the defendant is a fugitive, the violation is of a relatively minor character, the indictment has been pending for three or more years, and the investigative agency has advised that investigative leads have been exhausted. Suggestions that the authority previously extended had lacked uniformity in its application are thought to be unwarranted, but the policy of requiring prior authorization by the Criminal Division for dismissals in fugitive cases will make it possible to demonstrate the reasonableness and uniformity with which dismissals of this kind are made.

POSTAL OFFENSES

Interception of Letter Carried in United States Mails before Delivery to Addressee. United States v. Shirley Ann Maxwell (W.D. Mo.). Defendant was charged by information with violating 18 U.S.C. 1702 by removing from a table in an apartment house a letter addressed to another tenant, opening such letter, secreting a check contained therein and later forging such check. There were three apartments in the house and a common mail box for all tenants was located on the porch of the building. It was customary for the resident manager or a tenant to remove the mail from the box and place the mail for other families on a table in the hall.

On December 15, 1955 the Court denied defendant's motion for a directed verdict and simultaneously filed a general verdict of guilty, stating that it was the legislative intent of Congress in 18 U.S.C. 1702 to extend protection to mail until it reaches the manual possession of the person to whom it was addressed. Defendant, in her motion, had contended that the resident manager or tenant removing the letter from the common mail box acted as ostensible agent of the addressee, that jurisdiction of the postal authority terminated and that theft of the letter by the defendant was not a violation of 18 U.S.C. 1702. It is indicated that the case will be appealed to the Court of Appeals for the Eighth Circuit.

Staff: Assistant United States Attorney Paul R. Shy (W.D. Mo.).

ELECTION FRAUDS

Conspiracy to Permit Fraudulent Voting. United States v. Louis William Nathan, et al. (N.D. Ill.). On January 7, 1956, after a trial which lasted five weeks, the United States District Court in Chicago, Illinois, found six defendants guilty of a criminal conspiracy

to permit fraudulent and multiple voting in the 7th Precinct of the 1st Ward in Chicago during the 1954 General Election. The indictment had charged ten men with conspiracy to violate the federally protected civil rights of the qualified voters to an honest election of Federal candidates.

Louis W. Nathan, the Democratic captain of the 7th Precinct, was sentenced to 5 years and a fine of \$4,000; Gaetano Alviti, his chief lieutenant, was sentenced to 4 years and six months and a fine of \$2,500, Frank Tornabene, Joseph Knight and Joseph Giralamo were sentenced to 4-year prison terms and a \$200 fine each, while Eugene J. Laurie, who pleaded guilty during the trial, was sentenced to 3 years and a fine of \$100. This action is hoped to have ended a long period of domination of the election machinery in Chicago's 1st Ward by a small group of corrupt politicians who maintained control of the election process for their own selfish interest by bribery, false records and vote buying.

Staff: Assistant United States Attorneys Raymond J. Mueller and Mitchell Reiger (N.D. Ill.).

FOOD AND DRUG

Misbranded Drugs. United States v. Wood (CA 4, December 7, 1955). A seizure action under 21 U.S.C. 334 was brought to condemn a drug called "Diabena" as misbranded for the reason that it was falsely labeled as effective in the treatment of diabetes. The District Court for the Eastern District of Virginia dismissed the case for the reason that the Government's expert witnesses who testified the drug was worthless had no actual experience with the use of the drug on patients with diabetes. The findings of the District Court state: "Without the result of actual use of the drug on patients with diabetes, I am unable to find that the Government has proved its case. In order to show that the drug is not effective as claimed to be, it must be proved that the drug was given to patients in accordance with its directions and at different levels of dosage, in order to give it a fair trial." No witnesses were called by claimant to testify that the product was effective and claimant relied upon an affidavit and statement of clinical records which had been filed with an application for a patent. These indicate that "Diabena" had been effective in the treatment of certain diabetics.

In reversing, the Court of Appeals followed the decision in other cases by holding that the opinions of qualified experts though based upon their general medical knowledge constitute substantial evidence irrespective of a lack of actual experience in the use of the drugs. The following observation in the opinion is significant: "Finally, we observe that it might indeed be difficult to find a diabetic who would act as a guinea-pig by abandoning insulin over any substantial period of time and submitting to treatment by "Diabena" or any other drug whose efficiency has not been established. Diabetes is a serious disease which, if not properly and promptly treated, tends to become increasingly dangerous. Indeed, Dr. Tucker unhesitatingly testified

that if a person suffering from diabetes is deprived of insulin, serious consequences might well follow."

The opinion also held that the granting of a patent gives no right of misrepresentation, but merely restrains others from manufacturing, using or selling what is covered by the patent.

Staff: United States Attorney L. S. Parsons (E.D. Va.);
Frank J. Kiernan, Attorney (Criminal Division)

FOOD AND DRUG

Spaghetti Standard. United States v. 20 Cases etc. "Buitoni 20% Protein Spaghetti" (CA 3). Claimant contended that its product containing 20% protein had a distinct and separate identity of its own and was not subject to the definition and standard of identity for spaghetti established under 21 U.S.C. 341, which limits the maximum protein content to 13% by weight. The opinion of the District Court for the District of Delaware holding that the product purports to be or is represented as spaghetti and therefore must conform to the standard, and granting the Government's motion for a summary judgment is reported in 130 F. Supp. 715. The Court of Appeals on January 3, 1956, affirmed the judgment stating that the opinion of the District Court completely and correctly disposed of the case.

Staff: Assistant United States Attorney H. Newton White (D. Del.);
Leonard G. Hardy, Attorney, Department of Health, Education and Welfare.

* * *

CIVIL DIVISION

Assistant Attorney General Warren E. Burger

SUPREME COURTFRAUDS

Statutory \$2000 Liquidated Damage Action by Government not Double Jeopardy after Prior Criminal Conviction for Same Acts. Rex Trailer Co., Inc. v. United States (Sup. Ct., Jan. 9, 1956). The Government brought suit under Section 26(b)(1) of the Surplus Property Act of 1944 to recover \$2000 statutory damages for each of five fraudulent acts done by defendants in connection with the sale of surplus motor vehicles to veterans. Defendant contended that the proceeding was to recover a penalty and was therefore barred by the double jeopardy provisions of the Fifth Amendment, because defendant previously pleaded nolo in a criminal proceeding based upon the same acts. The Supreme Court affirmed the Seventh Circuit's decision (reported in this Bulletin, Vol. 3, No. 3, pp. 14-15) that the \$2000 was a non-penal civil remedy and did not place defendant in jeopardy for a second time. The Court construed the \$2000 provision of Section 26(b)(1) as being comparable to liquidated damages which were additional to criminal penalties, and therefore, on the authority of United States ex rel. Marcus v. Hess, 317 U.S. 537, and Helvering v. Mitchell, 303 U.S. 391, rejected the double jeopardy contention. Since the Supreme Court stated that it had granted certiorari "to resolve an asserted conflict between the decisions" in United States v. Weaver, 207 F. 2d 796 (C.A. 5) and United States v. Witherspoon, 211 F. 2d 858 (C.A. 6) which had disagreed as to whether Section 26(b)(1) was compensatory or penal for the purpose of the 5-year limitation on suits for penalties provided in 28 U.S.C. 2462, the Supreme Court's ruling makes it clear that 28 U.S.C. 2462 is not applicable to actions under Section 26(b)(1).

Staff: Melvin Richter (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Interpretation of Section 5 of Act - Indemnity as Measure of Damages for Breach of Contract. Ryan Stevedoring Co., v. Pan-Atlantic S.S. Corp. (Sup. Ct., Jan. 9, 1956). For the facts and earlier proceedings see U.S. Attorneys' Bulletin, Vol. 3, No. 10, p. 11. On May 16, 1955 the Supreme Court vacated its per curiam affirmance of the judgment below and ordered reargument (349 U.S. 926). After the reargument the Court reaffirmed the decision of the Court of Appeals by a vote of five to four. Mr. Justice Burton, writing for the majority, concluded that the exclusive liability provision of Section 5 of the Act is limited to the relationship between employer and employee, or those claiming under him, and that it does not

curtail the employer's liability from independent contractual obligations. Here, the stevedoring company had promised the ship to stow the cargo in a reasonably safe manner. This undertaking is in the nature of a warranty, similar to a manufacturer's warranty of the fitness of its manufactured product. The shipowner may recover damages for a breach of this warranty even if he fails to discover or correct such breach. The minority dissented primarily on the ground that if the employer were confronted with the possibility of an indemnity action by a third person tortfeasor who had been sued by his employee, he could as a practical matter prevent the employee from exercising this statutory right.

Staff: Leavenworth Colby, Paul A. Sweeney,
Herman Marcuse (Civil Division)

COURT OF APPEALS

ADMIRALTY

Suits in Admiralty Act Limitations Provision Applies to Libel for Excessive Charter Hire - Cause of Action Accrues upon Redelivery of Vessels rather than Final Accounting. Sword Line, Inc. v. United States (C.A.2, Dec. 14, 1955). Libelant sought to recover a portion of the charter hire charged by the Maritime Commission under the "foreign trade charters" provision of the Ship Sales Act of 1946, which allegedly exceeded the statutory ceiling. A similar case, American Eastern Corp. v. United States was reported in this Bulletin at Vol. 3, No. 15, p. 10. The Court of Appeals affirmed the District Court's dismissal of the libel ruling that (1) the suit is properly brought under the Suits in Admiralty Act so that the two year limitations period applies, (2) the cause of action accrued when the vessels were redelivered to the Commission rather than when the accounting relative to the amount of charter hire was finalized, and (3) that, in view of these first two decisions, the limitations period had expired for the libelant and the District Court therefore lacked jurisdiction.

Staff: Leavenworth Colby, Benjamin H. Berman
(Civil Division)

GOVERNMENT EMPLOYEES

Dismissal Charges Specific Enough if Fair Chance Afforded to Defend. J. Stanley Baughman v. A. Lincoln Green (C.A.D.C., Jan. 12, 1956). Appellee was dismissed from his position with the Federal National Mortgage Association on charges of improper conduct toward office personnel, improper use of government office and property, improper use of government personnel, improper absences from office, and refusal to respect authority of superiors. Each of the charges set forth a number of instances of the conduct charged and the approximate dates of the offenses. On administrative appeal, appellee contended, inter alia, that the charges were not

stated "specifically and in detail" as required by Section 14 of the Veterans' Preference Act, 5 U.S.C. 863. The Civil Service Commission, after a hearing, rejected two of the charges for lack of specificity, but affirmed the dismissal on the remaining charges, and appellee thereupon brought this action for reinstatement. On cross motions for summary judgment, the District Court awarded judgment to appellee on the ground that all of the remaining charges were likewise invalid for lack of specificity. The Government appealed, and the Court of Appeals reversed. It found that appellee was given sufficient information of the charges against him to afford him a fair chance to defend himself and held that this consideration controlled rather than the standards of a criminal indictment. The Court noted that appellee's reply to the charges was lengthy and detailed, and stated that although he complained of their vagueness he clearly understood the charges and endeavored at great length to rebut them. The Court held further that the action of the Commission in rejecting two of the charges did not vitiate its decision that removal on the remaining charges was valid. The case was remanded to the District Court for consideration of the other matters raised in the complaint.

Staff: Paul A. Sweeney, Robert S. Green (Civil Division)

GOVERNMENT EMPLOYEES

Dismissal Upheld for Writing Letter of Grievances to Superiors Containing False and Unfounded Defamatory Charges. Genie A. Keyton v. Robert B. Anderson (C.A.D.C., Jan. 19, 1956). Plaintiff was dismissed from Government employment under charges which included the fact that she had written a letter to her superiors to complain of mistreatment and which, according to the Civil Service Commission, contained false and unfounded statements that slandered, defamed, and reflected unfavorably upon the motives, integrity, and efficiency of her immediate superiors. The Court of Appeals affirmed the District Court's dismissal of her action for reinstatement, and pointed out that, although she could not have been dismissed for merely submitting a grievance letter, that right does not include the privilege of making false and unfounded defamatory charges. Finding that no procedural rights of plaintiff had been denied and that the charges had been administratively accepted as grounds for removal, the Court considered its function exhausted.

Staff: United States Attorney Leo A. Rover and
Assistant United States Attorneys
Carl W. Belcher, Lewis Carroll and
Joseph A. Rafferty, Jr. (D.D.C.)

GOVERNMENT EMPLOYEES

Jurisdiction in Actions for Reinstatement. Frank Burns, et al. v. Col. Arthur A. McCrary, et al. (C.A.2, Jan. 11, 1956). Plaintiffs, Army civilian employees, after being notified that they would be reduced in grade, filed administrative appeals before the effective date of the reductions. They also brought this action in the Eastern District of New York against officials of their installation to have the reduction orders declared void, and, without seeking an adjudication of their rights prior to the final administrative decision, asked that the reductions be enjoined pending the outcome of the administrative appeals. On the theory that it could thereby retain jurisdiction to review the reduction orders and save plaintiffs the necessity of seeking such review in the District of Columbia, the District Court granted the temporary injunction. The Court of Appeals reversed and ordered the action dismissed for lack of jurisdiction. It held that because the administrative remedies had not been exhausted, and because the final administrative decisions would be made by officials residing in Washington who had not been served with process (Civil Service Commission for the veteran plaintiffs, Secretary of the Army for the others), there was no jurisdiction to grant either a temporary or a final injunction. When an employee has actually been discharged or demoted, it is clear that his relief must be sought in the District Court for the District of Columbia, because only that Court can obtain jurisdiction over the necessary officials, Blackmar v. Guerre, 342 U.S. 512, and grant a writ of mandamus to order reinstatement. United States ex rel. Vassel v. Durning, 152 F. 2d 455 (C.A.2). Some district courts thought that by temporarily enjoining adverse action by local officials they might grant permanent relief against those officials, by way of injunction rather than mandamus and without the necessity of joining parties who could not be served, after the exhaustion of administrative remedies. This decision establishes that district courts outside the District of Columbia have no jurisdiction to grant any injunctive relief in cases of this type, whether or not adverse administrative action has been taken.

Staff: John J. Cound (Civil Division).

LONGSHOREMEN'S & HARBOR WORKERS' COMPENSATION ACT

Injury Specified in Statutory Schedule of Losses Is Conclusively Presumed to Cause Stated Loss Or Reduction of Wage-Earning Capacity. Bethlehem Steel Co. v. Frank A. Cardillo (C.A.2, Jan. 11, 1956). Plaintiff sued to set aside a compensation award made by the Deputy Commissioner for loss of hearing resulting from his employment. The complaint alleged that the impairment of hearing did not result in any incapacity to earn the wages which the employee was receiving at the time of the injury. The Court of Appeals affirmed the District Court's order of summary judgment for defendant, because loss of hearing is one of the "schedule losses" set forth in Section 908 of the Act. Referring

to its decision in Travelers Insurance Co. v. Cardillo, 225 F. 2d 137 (C.A.2), the Court stated that "as to any schedule loss, there is a conclusive presumption of loss or reduction of wage-earning capacity."

Staff: United States Attorney Leonard P. Moore and Assistant United States Attorney Elliott Kahaner (E.D.N.Y); Stuart Rothman, Ward E. Boote, and Herbert P. Miller (Dept. of Labor).

GOVERNMENT EMPLOYEES

Summary Dismissal Statute Held Constitutional. Scher v. Weeks (C.A.D.C., Jan. 19, 1956). Plaintiff was summarily dismissed from his position in the Department of Commerce pursuant to the authority vested in the Secretary of Commerce by Section 304 of P.L. 495 of the 82nd Congress (66 Stat. 549, 567), "in his absolute discretion" to terminate the employment of any employee "whenever he shall deem such termination necessary or advisable in the best interest of the United States." In this action, plaintiff, arguing that his dismissal was arbitrary and capricious, sought a declaration that the removal was invalid. The Court of Appeals affirmed the judgment entered by the District Court for the Government, holding that the statute was constitutional.

Staff: Benjamin Forman (Civil Division)

PROCEDURE

Appeals in Frivolous Civil Cases Disposed of by Motion to Dismiss. Duggins v. Hyde (C.A.D.C., Nov. 14, 1955) and Easter v. Eisenhower (C.A.D.C., Dec. 16, 1955). These two cases are representative of the many frivolous civil actions brought in the federal courts, which must be defended by the United States Attorney. In the Duggins case, the plaintiff sought power to cancel the authority for operation of various commercial radio transmitters on the ground that, because of his peculiar physiological structure, he allegedly received such transmissions directly and they interfered with his powers of concentration and ability to perform certain tasks. In the Easter case, the plaintiff used the pleadings to voice his opinion on such matters as the public debt, segregation, taxation, and the salaries of members of Congress. In each case the District Court granted a motion to dismiss, the United States Attorney appearing as amicus curiae in the Easter case, and the plaintiff appealed. In the two cases respectively, the Government filed in the Court of Appeals a motion to affirm and a motion to affirm or dismiss the appeal. The Court of Appeals dismissed both appeals without opinion.

Staff: United States Attorney Leo A. Rover and Assistant United States Attorney Lewis Carroll (D.D.C).

SURPLUS PROPERTY ACT

Government Interest in Planes Transferred under Educational Disposal Program Expires Three Years after Transfer. School District 2 Fractional, etc. v. United States (C.A. 6, Jan. 13, 1956). In 1947, the Government transferred a C-46 aircraft to defendant school, receiving therefor \$200, pursuant to an educational disposal program then supervised by the War Assets Administration. Under this program, the school first executed an application-agreement, entitled WAA Form 65, which included a promise that "all acquired property when unfit for the above [educational] purpose will be sold only as scrap * * *." The WAA regulation under which Form 65 was issued provided that "the disposal agency shall establish procedures pursuant to which such educational * * * institutions * * * may make written application for surplus aeronautical property" and that "such procedures shall include * * * an agreement that the property will not be resold to others within three (3) years of the date of purchase * * * unless it is mutilated or otherwise rendered unfit for use except as scrap." Approximately four years after the school obtained the plane, it sold it to the defendant aircraft company for \$7,120, and the Government brought this action to recover the plane or its fair value. The District Court granted judgment for the Government, finding that all the parties understood that the Government retained some interest in the plane under which a violation of the terms of the Form 65 agreement would entitle the Government to repossess it. On appeal, the Court of Appeals reversed, holding that the language of Form 65 relied upon by the Government was inconsistent with the applicable language of the regulation. The Court thus rejected the Government's argument that the regulation was intended only to prescribe minimum conditions which the disposal agency must obtain and was not designed to prevent the agency from obtaining more beneficial terms for the Government. The Court ruled, therefore, that the Government had no claim for breach of contract for a sale of the plane by the school more than three years after the original transfer and that, in the absence of an express condition for reverter, there was no right to repossession.

Staff: Richard M. Markus (Civil Division)

TORT CLAIMS ACT

Discretionary Function Exception Inapplicable to Negligence at Operational Level. Dahlstrom v. United States (C.A.8, Jan. 10, 1956). While loading hay onto a hayrack in a field inside the city limits, plaintiff was injured when his team of horses was frightened by the noise of a low flying airplane and bolted. The plane, a twin engine Beechcraft, was being flown at an altitude of 100 feet by a Civil Aeronautics Administration pilot, who was making an aerial survey for the purpose of establishing an instrument approach pattern for an airport one mile from plaintiff's field. The District Court dismissed the action as barred by the discretionary function exception of the Tort Claims Act. 28 U.S.C. 2680(a).

The Court of Appeals affirmed the District Court's finding that the pilot was faithfully complying with CAA orders in making the survey in a twin engine plane at low altitudes but held that the discretionary function exception does not apply to negligent acts committed at the operational level. Ruling that the Government would be liable if the pilot had failed to keep a proper lookout and if such negligence proximately caused plaintiff's injuries, the Court remanded the case for specific findings on the questions of negligence and proximate cause.

Staff: Benjamin Forman (Civil Division).

TORT CLAIMS ACT

Driving on Left Side of Road only Prima Facie Evidence of Negligence. Loyola Rose Woods v. United States (C.A.10, Dec. 19, 1955). Plaintiff sought damages for injuries arising out of a collision involving a car driven by a federal employee acting within the scope of her employment. The Government driver had travelled approximately 26 miles before the collision and had experienced no slipping or skidding of her car when passing over occasional ice patches. She had been driving at 25 to 30 miles per hour, and when she approached the bridge on which the accident occurred, she slowed to a speed between 10 and 15 miles per hour. Because of a thin layer of ice on the bridge which neither the Government driver nor her passenger could see from the front seat of their car, the Government vehicle began to slide across the center line. The driver took her foot from the accelerator, did not apply the brakes, and attempted to steer out of the skid. She was unsuccessful, however, and the Government vehicle skidded across the center line and was struck by plaintiff's oncoming car. The Court of Appeals affirmed the District Court's ruling that violation of the Oklahoma statute requiring vehicles to be driven on the right side of the road was only prima facie evidence of negligence and that in the circumstances of this case the other evidence rebutted that presumption and established the Government driver's exercise of due care.

Staff: United States Attorney Frank D. McSherry,
Assistant United States Attorneys
Harry G. Fender and Paul M. Brewer (E.D.Okla.).

TORT CLAIMS ACT

Service - Incident Death not Actionable. Norris v. United States (C.A.2, Jan. 13, 1956). This claim for damages under the Act was based on a soldier's wrongful death allegedly caused by the Army's negligence in assuming he was a malingerer and in failing to give him prompt and adequate medical treatment. The District Court's opinion, relying on Feres v. United States, 340 U.S. 135, granted the Government's motion for summary judgment. The Court of Appeals rejected plaintiff's attempts to distinguish Feres and affirmed per curiam in open court on the opinion below.

Staff: Morton Hollander (Civil Division).

VETERANS

Administrative Decision Forfeiting Compensation Benefits Held Non-Reviewable. Joseph W. DiSilverestro v. United States (C.A.2, Jan. 3, 1956). Appellant appealed from a District Court order dismissing for want of jurisdiction a complaint which sought review of a Veterans Administrator's decision that appellant, under 38 U.S.C. 715, had forfeited his right to compensation benefits. Relying upon the finality and non-reviewability provisions of 38 U.S.C. 705, applicable to the decision in question, the Court of Appeals, *per curiam*, affirmed on the opinion of the District Court (132 F. Supp. 692).

Staff: John G. Laughlin (Civil Division).

VETERANS

Change of N.S.L.I. Beneficiary Held Demonstrable from Evidence of Insured's Intent. Helen Pope v. Priscilla Smalley, et al. (C.A.6, Jan. 10, 1956). Deceased insured's sister brought this action against his widow and the United States to recover the proceeds of a \$10,000 National Service Life Insurance policy. The Board of Veterans Appeals had ruled that the beneficiary under the policy had been changed by the insured from his sister to his wife and that the wife was therefore entitled to the proceeds of the policy. The District Court ruled for plaintiff on the ground that there was no direct evidence that a change of beneficiary form had ever been completed by the insured or that any of the records of the unit in which the insured was serving had been lost or destroyed. The Court of Appeals reversed, holding that the wife was entitled to the proceeds, even though it accepted the findings relied upon by the District Court. The Court of Appeals noted that the wife had received letters indicating the insured's love and affection for her and her child by a previous marriage and that these letters included statements by the insured that the \$10,000 insurance policy was payable to the wife. Moreover, the insured had completed a form designating his wife, in place of his sister, as the person to receive the six months' gratuity pay allowed and as the person to be notified in case of an emergency. With regard to the absence of a formal application for change of beneficiary, the Court concluded that this requirement was established for the protection of the Government rather than the original beneficiary, so that when, as here, the Veterans Administration's ruling effectively waived the requirement for a formal application, the clearly expressed intent of the insured should govern.

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

DISTRICT COURTBANKRUPTCY

Trustee Personally Liable for Negligent Failure to Discover Government Judgment Lien in Distributing Proceeds of Sale. Matter of Claude R. Prather (Bankruptcy) (S.D. Ill., Jan. 3, 1956). The Trustee of the bankrupt estate obtained permission from the court to sell a certain piece of realty owned by the bankrupt, "free and clear of all liens with any liens to be transferred to the proceeds of sale thereof". At that time, the Government had a valid recorded judgment lien against all the realty of the bankrupt. Although the trustee had record notice of the Government's lien, he failed to discover its existence and to give notice to the Government of the proceeds available to satisfy the lien. The District Court affirmed the referee's decision (reported in this Bulletin, Vol. 3, No. 4, p. 21) that this failure amounted to negligence for which the trustee was personally liable.

Staff: Assistant United States Attorney John M. Daugherty (S.D. Ill.); Robert Mandel (Civil Division).

DAMAGES

Testimony of Libelant Considered Insufficient to Establish Diminution of Earning Capacity. Van Winkle v. United States (E.D. Va., Dec. 5, 1955). Libelant sought to recover for alleged injuries resulting from a collision between a Government vessel and the tanker on which libelant was standing. His damage claims were solely for diminution in earning capacity and pain and suffering and, in support of his claim, he testified that the day following the accident he took a job as second mate which involved navigation and paper work rather than physical work, and that several months later he informed his superiors that he was physically unable to resume the duties of chief mate. The Government offered evidence that in the past the libelant had sailed as second mate and as chief mate and that he had only recently been again designated as chief mate. In its opinion, the Court disallowed the claim for diminution in earning capacity, stating that libelant had not carried the burden in this respect.

Staff: Assistant United States Attorney John M. Hollis (E.D. Va.).
Rollins M. Koppel (Civil Division).

JUDICIAL REVIEW

Failure to Complete Administrative Appellate Procedure Prevents Judicial Review. Lawrence Curtis, et al. v. Robert Schaffer (S.D.N.Y., Dec. 27, 1955). Plaintiff sought to enjoin enforcement of a fraud order

issued by the Postmaster General. Following his administrative hearing, which resulted in a determination adverse to plaintiff, he was advised of his appellate rights and filed an administrative notice of appeal. However, he proceeded no further, and the appeal was dismissed upon default. Issuance of the fraud order followed. The District Court found that plaintiff had failed to exhaust his administrative remedies and therefore had no power to sue. The doctrine requires not merely the initiation of prescribed procedures, but also pursuit of them to their final outcome before seeking judicial intervention.

Staff: United States Attorney Paul Williams and
Assistant United States Attorney Harold J.
Raby (S.D.N.Y.).

INJUNCTION

Failure to Pursue Administrative Remedy and Statutory Review by Court of Appeals Prevents District Court Injunction Action to Challenge Constitutionality of Statute. Jem Mfg. Corp. v. Mitchell (D.D.C., Jan. 5, 1956). Manufacturers in Puerto Rico filed this injunction action to invalidate 1955 amendments to the Fair Labor Standards Act which provide for the setting of minimum wages in Puerto Rico by industry committees appointed by the Secretary of Labor. The District Court denied plaintiff's application for a preliminary injunction, declined to convene a 3-judge court to hear the constitutional challenge to the Act, and dismissed the complaint, on the ground that plaintiff had not exhausted its administrative remedy before the industry committee and that constitutional questions could thereafter be determined under a statutory review by the Court of Appeals.

Staff: Assistant United States Attorney Joseph A. Rafferty;
Bessie Margolin (Department of Labor).

LIENS

Statutory Lien for Products Made under Navy Contracts Has Priority over Mechanic's Lien of Subcontractor. Thompson Machine Works Co. v. Lake Tahoe Marine Supply Co., Inc. (N D. Cal., Dec. 22, 1955). A Government subcontractor received 21 bronze rods from its prime contractor to be machined into propeller shafts. The prime contractor defaulted on its contract and went into bankruptcy. The contract provided that upon default the contractor could be directed to convey to the Navy the title to supplies and manufacturing material and under this provision title to the shafts was so conveyed. The subcontractor who still had possession of the shafts, asserted that such title was subject to its mechanic's lien. While admitting that a clause providing for conveyance of title upon default differs from a clause automatically transferring title as soon as the contractor acquires the material, the Court held that the mechanic's lien had been destroyed when title passed to the

Government. The Government also claimed a first lien under a statute applicable only to Navy contracts. 34 U.S.C. 582. The Court rejected the subcontractor's arguments that the statute applied only to the vessels themselves, that components not yet installed in the vessel were unaffected by the lien, and that the statutory lien was inapplicable to one shaft which was made as a spare to protect against faulty material or workmanship.

Staff: Assistant U. S. Attorney James B. Schnake (N.D. Cal.);
Robert Mandel (Civil Division).

SOCIAL SECURITY

Wife Must Prove She Was "Living With" Husband at Time of His Death to Qualify for Mother's Benefits. Anna M. Healey v. Marion B. Folsom (S.D.N.Y., Dec. 28, 1955). Following administrative denial of her claim, plaintiff filed suit for Social Security "mother's insurance benefits" under 42 U.S.C.A. 402(g), as the widow of a deceased wage earner. The statute requires that the claimant be "living with" the decedent at the time of his death, and the requirement is fulfilled "if they are both members of the same household" or if the wife is receiving regular contributions from the wage earner for her support (42 U.S.C.A. 416(h)(2)). The evidence showed that plaintiff and decedent separated in 1947 because of his alcoholism, and lived apart until his death in 1953. Decedent visited plaintiff occasionally, and plaintiff bore three children following the separation. Plaintiff's testimony that decedent gave her an average of \$80.00 a month was found to be unsubstantiated and in conflict with her own previous statements. Social Security records showed decedent's annual earnings after 1947 were very low. The District Court held that the findings of the Administrator were supported by substantial evidence, and granted summary judgment to defendant.

Staff: United States Attorney Paul W. Williams and
Assistant United States Attorney Arthur B.
Kramer (S.D.N.Y.).

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T A X D I V I S I O N

Acting Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decision

Deductibility of Non-Business Expenses. United States v. John S. Mellinger and Sweeney J. Doehring, Executors of the Estate of Mary Edith Giles, Deceased (C.A. 5, January 6, 1956). In this case the taxpayer loaned \$4,000 to one Larendon in 1930. The loan was evidenced by a note bearing interest and payable one year from date, and was secured by second liens on real estate and also by insurance policies on the life of Larendon. When the note matured, Larendon was insolvent and was unable then or any time thereafter until his death in 1952 to pay any part of the principal or interest. The second liens were rendered valueless by foreclosure under prior mortgages, leaving only the life insurance policies from which taxpayer might hope to recover anything. Larendon had already borrowed the maximum loan amount on these policies before pledging them with taxpayer; and since the amount he had borrowed was the cash surrender value of the policies, there was no cash surrender value at the time he became insolvent. Since these policies were taxpayer's only hope for reimbursement, she continued to pay just enough on premiums and interest on the policy loans to keep the policies alive. Thus the policies never had any cash value, but if Larendon died soon enough the net proceeds might repay taxpayer for her loan. Larendon died in 1952, but before that time, in 1938, taxpayer had passed the point of no return. She had expended so much money on premiums and interest that, even if she kept the policies alive until Larendon's death, she could no longer by any possibility recoup her outlay from the proceeds of the policies.

On appeal, the issue was whether the District Court had correctly ruled that taxpayer was entitled to deduct as non-business expenses under Section 23 (a)(2) of the 1939 Code the payments made to keep the policies alive during the years 1942 through 1948.

The Fifth Circuit reversed the District Court, agreeing with the Government that the payments described above were not expenses "paid or incurred * * * for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income," within the meaning of Section 23 (a)(2). Referring to the quoted statutory language, and stressing the fact that during the tax years taxpayer had no prospect whatever of receiving income in return for her payments on the policies, the Court said (Op. p. 7): "It seems too clear for argument that if we give to this language the meanings ordinarily attributed to the words, the payments do not satisfy the requirements of the statute." The Court said further (Op. pp. 7-8)--"every payment made by the taxpayer was in effect an investment by her on a speculative contract, which was no different from any payment made by the owner of a life insurance contract. * * * This is no different than it would have been had she made a similar speculation on the life expectancy of any other person in whose life she

had an insurable interest. To hold that such premium payments are deductible would be tantamount to holding that premiums on any life insurance policy are deductible. This, of course, cannot be done under the language and the clear intent of the statute."

The Court agreed with the Government that these payments were more analogous to capital expenditures than to sums paid for the conservation or maintenance of property.

Staff: Donald P. Hertzog, Grant W. Wiprud (Tax Division)

District Court Decisions

Federal Tax Liens - Priority over Mechanic's Lien. Barrett & Hilp v. Arthur H. Samish, United States, et al. (S.D. California). Plaintiffs sued to foreclose mechanics' liens stipulated at \$222,644.55 on certain real property. Taxpayer owned a one-third interest in this property as tenant in common. Materials and labor were furnished between May 17, 1952 and April 10, 1953. The relevant assessment lists were not received by the District Director until April 24, 1953. The unpaid Federal liens totaled \$924,988.41. Plaintiff, reading in San Francisco newspapers that the tax lien was about to be filed, was able to record his mechanic's lien in the county where the property was located on April 28, 1953. The Federal tax liens were filed two days later on April 30, 1953.

The Court held that the Federal tax lien arises on the date the assessment list is received by the District Director and that it is entitled to priority over all unperfected liens. Mechanics' liens are unperfected liens until they are "reduced * * * to judgment and recorded [as] an abstract of judgment with the Court Recorder." The Court also held that a mechanic's lienor was neither a mortgagee, pledgee, purchaser or judgment creditor within the meaning of Section 3672 of the 1939 Revenue Code. The Government was awarded a first priority as to taxpayer's one-third interest.

Staff: United States Attorney Laughlin E. Waters (S.D. Calif.)

Interest Deduction - Corporate Securities as Evidence of Indebtedness. Beaver Pipe Tools, Inc. v. Carey (N.D. Ohio). Taxpayer issued "8% Preferred Debentures" in exchange for its outstanding 8% preferred stock. The principal purpose of the exchange was to effect a tax saving through the deduction of "interest" on the "8% Preferred Debentures", the dividends on the preferred stock not having been deductible. "Interest" was payable on the "8% Preferred Debentures" whether or not there were sufficient earnings. However, the principal was payable only on the liquidation of the taxpayer or in the event of default.

In these actions to recover taxes paid as the result of the disallowance of the claimed interest deduction for the years 1940 through 1949, the Court held that the "interest" payments were not interest on indebtedness within the meaning of Section 23(b) of the Internal Revenue Code of 1939 and denied recovery. Of particular significance is its holding that

the absence of a fixed maturity date when the principal would be payable unconditionally is alone sufficient to prevent the instruments from being evidence of an "indebtedness" within the meaning of Section 23(b) and Section 29.504-2 of Treasury Regulations 111. The Court also noted that the "8% Preferred Debentures" were junior to general creditors in the event of liquidation of the taxpayer. This feature, it observed, is characteristic of stock and does not indicate an intent to create an indebtedness.

Staff: Ruppert Bingham and Harlan Pomeroy (Tax Division)

Refund Claim - Taxpayer Permitted to Sue for Larger Sum than Asserted on Its Claim for Refund. Westchester Fire Insurance Company v. United States (S.D. N.Y.). Plaintiff stated five causes of action in a tax refund claim. One cause of action proceeded on the theory that fire insurance salvage recoveries for the year 1944 constituted a recovery exclusion within the meaning of the pertinent sections of the Internal Revenue Code and Regulations, and was based upon a refund claim for \$3,827.31. Plaintiff contended that the refund claim erroneously computed this figure and that it was clear on the face of the claim that the proper figure sought in refund was \$19,827.31. Plaintiff moved to amend the complaint to assert the higher figure. Defendant argued that the amendment would introduce new facts and a legal theory, not contained in the refund claim, which it did not have an opportunity to investigate and over which, consequently, the Court had no jurisdiction. 26 U.S.C. 3772(a), Treasury Regulations 111, Section 29.322-3.

The Court, recognizing the law as urged by defendant, nevertheless concluded that plaintiff's amendment was proper. It stated that the amendment merely changed the basis for computing the amount by refund claim by alleging, in effect, that salvage recoveries in 1944 were \$49,568.28 instead of \$9,568.28, but that the basic facts and theory as set forth in the refund claim were exactly the same and "pointed unerringly to the items the Commissioner was to consider."

Staff: Assistant United States Attorney George M. Vetter, Jr.
(S.D. N.Y.)

Exempt Income - Amounts Paid under Wage-Continuation Plan not Exempt as Health Insurance. Branham v. United States (W.D. Ky.). Payments made by the Standard Oil Company (incorporated in Kentucky) to one of its employees who was absent on account of sickness were held by the District Court not to be exempt from income tax as amounts received through health insurance within the meaning of Section 22(b)(5) of the Internal Revenue Code of 1939. The payments were made pursuant to the terms of the employer's Temporary Disability Benefit Plan. In denying the exemption, the Court, after noting that exemptions from taxation are not to be enlarged by implication, concluded that the plan was not insurance because there was not a contract, no premium, and no risk distribution. It cited and distinguished Epmeier v. United States, 199 F. 2d 508 (C.A. 7), and cited but did not follow Herbkersman v. United States, 133 F. Supp. 495 (S.D. Ohio),

pending on appeal (C.A. 6). Similar cases involving this issue are pending in many of the district courts and in the Court of Appeals for the Fifth Circuit.

Staff: Harlan Pomeroy (Tax Division)

CRIMINAL TAX MATTERS
Appellate Decisions

Voluntary Disclosure - Pre-indictment Injunction Proceeding against Use of Such Evidence is Premature. Benes v. Canary, 224 F. 2d 470 (C.A. 6). On December 5, 1955, the Supreme Court denied certiorari in the above entitled case which was previously noted in the Bulletin for November 25, 1955, page 17. Benes brought a pre-indictment injunction proceeding against the United States Attorney to prevent the latter from using before the grand jury evidence which had been obtained as the result of an alleged valid voluntary disclosure. The District Court found that there had been no valid disclosure and denied the petition. On appeal the Sixth Circuit held that the question of admissibility of the alleged voluntary disclosure could not be raised by a pre-indictment injunction proceeding or motion to suppress evidence. The attempt to determine the admissibility of such evidence prior to indictment is premature and constitutes an innovation in criminal procedure which is unauthorized by the provisions of Rule 41(e) of the Federal Rules of Criminal Procedure. In the petition for certiorari Benes asserted a conflict between the decision in this case and that of the Second Circuit in the Fried case (161 F. 2d 453 (C.A. 2), certiorari granted, 331 U.S. 804, writ dismissed, 332 U.S. 807). The Government's opposition distinguished the Fried case, which involved a confession obtained after prolonged interrogation of the defendant while under arrest. In this case there was no arrest and there was no confession for Benes made it clear that the additional income which he disclosed had not been omitted from the returns with wilful intent to evade taxes.

This case provides authority for resistance to all pre-indictment motions to suppress evidence which do not involve searches and seizures and are not clearly authorized by the provisions of Rule 41(e).

Staff: Joseph M. Howard (Tax Division)

Instruction on Lesser Included Offenses in Tax Evasion Cases - Applicability of Section 3616(a) of 1939 Code of Income Tax Violations. Dillon v. United States, 218 F. 2d 97 (C.A. 8). As was pointed out in the Bulletin for April 15, 1955, the Court of Appeals for the Eighth Circuit held in this case that Section 3616(a) had no application to income tax returns, and upheld the trial court's refusal to instruct the jury that they could find the defendant guilty under Section 3616(a). This instruction had been requested by the defense on the theory that this was a lesser offense included within the Section 145(b) offense charged in the indictment. In opposing the petition for the certiorari the Government took the position that Section 3616(a) does apply to income tax returns. The Government argued, however, that Section 3616(a) does not involve a

lesser offense necessarily included under Section 145(b). The petition for certiorari was granted, and the Government's brief on the merits in the Supreme Court had been prepared in draft form, when the case became moot because of the death of the petitioner. On December 5, 1955, the Supreme Court dismissed the writ.

The same question is, however, still pending before the Supreme Court in another case. The exact issue had been presented in Berra v. United States, 221 F. 2d 590 (C.A. 8), noted in the Bulletin for May 13, 1955, page 27. The Supreme Court granted certiorari in this case on December 5, 1955, at the same time it dismissed the writ in the Dillon case. The Government's brief is now being prepared.

Staff: Richard B. Buhrman (Tax Division)

Failure to Comply with Rule 30-Rule against Impeachment of Verdicts. Armstrong v. United States, (C.A. 8, January 18, 1956). A \$2,500 payment made to appellant by his employer had been omitted from appellant's income tax return for 1949. Appellant had requested that the jury be instructed to determine whether this was a gift or a taxable bonus. Instead of giving the requested instruction, the trial court held as a matter of law that the payment was a taxable bonus and instructed the jury to determine whether its omission from the return was willful. A verdict of guilty was returned with a recommendation of leniency. Appellant sought a new trial upon the court's refusal to grant the requested instruction and upon the further ground that the verdict had been compromised. The latter ground was supported by the sworn statements of three jurors that they did not believe appellant to be guilty but that they agreed to the verdict upon the condition that leniency be recommended. The trial court denied appellant a new trial.

The judgment of conviction was affirmed on appeal. With regard to the trial court's instructions to the jury, it was noted that appellant had failed to comply with Rule 30, Federal Rules of Criminal Procedure. The Court of Appeals pointed out appellant's failure to serve a copy of his proposed instruction upon Government counsel, that had this been done it would have permitted Government counsel to join in the request so as to avoid any later question on this score, that appellant had also failed to object to the Court's actual instruction, and that in any event, the more important issue was whether for that year the understatement of income, which greatly exceeded \$2,500, was willful. On the remaining issue it was held that what occurred during the deliberations in the jury room inhered in the verdict and that the verdict could not later be impeached by the evidence of former jurors.

Staff: United States Attorney Edward L. Scheufler and
Assistant United States Attorney Kenneth C. West
(W.D. Mo.)

* * *

ANTITRUST DIVISION

Assistant Attorney General Stanley N. Barnes

SHERMAN ACT

Indictment Under Section 1, - Boycott. United States v. International Boxing Guild, et al., (N.D. Ohio). On January 10, 1956, an indictment was returned against the International Boxing Guild, its affiliated Cleveland local the Boxing Guild of Ohio and Charles Johnston and William Daly, president and treasurer of the International, and Albert W. Del Monte, president of the Cleveland local. The International Boxing Guild is an association of local boxing managers' guilds. The International and its affiliated local guilds have included within their membership the managers of virtually all boxers who participate in major boxing shows in the United States.

The indictment charges that since 1952, defendants have subjected non-member managers, dissident members, and promoters disapproved by the International or its affiliates to an organized boycott; that a general boycott has been maintained against professional boxing shows promoted for television audiences, known as "studio boxing shows"; that defendants' activities culminated in the cancellation of a studio boxing show telecast by Station WEWS, Cleveland, Ohio, from April to October 1955; that the premises of WEWS were picketed; and that boxing managers who permitted their boxers to participate in the studio shows were expelled from Guild membership and were boycotted. The indictment also charges that defendants have fixed prices charged promoters for participation of boxers managed by Guild members in televised boxing shows.

Staff: Robert B. Hummel, Norman H. Seidler, John T. Dowling
and Edward J. Masek. (Antitrust Division).

Court Ruling on Interrogatories. United States v. National Screen Service Corporation, et al., (S.D. N.Y.). On January 10 and 11, 1956, Judge Sugarman handed down an opinion and orders overruling most of the objections made to plaintiff's interrogatories dated February 25, 1955, as amended by stipulation dated July 11, 1955.

A novel feature of Judge Sugarman's order is his treatment of defendant National Screen Service Corporation's objection to answering two interrogatories [12(b) and 12(c)] on the ground of burdensomeness. These interrogatories seek the number of theatres serviced by National Screen Service Corporation with talking trailers, sound trailers, specialty accessories and standard accessories, and the number of theatres under contract with National Screen Service Corporation for all requirements of these advertising devices. In this particular, the Court granted National Screen Service Corporation an option either to answer the interrogatories or to permit plaintiff to inspect company files.

An objection on grounds of hearsay to an interrogatory requiring defendant National Screen Service Corporation to state the annual gross income and the number of theatres serviced by each of the businesses acquired by defendant for two years prior to each acquisition was overruled on the ground that, regardless of whether the information sought is hearsay, if it is in movant's possession and "relevant" it should be given to plaintiff.

The Court stated that objection by defendant that it did not have records to fully answer two other interrogatories was "not really an objection and calls for no ruling by this court". However, the Court disagreed with plaintiff's contention that it was entitled to a detailed account of why particular information was not available and what efforts were made to locate it, and said that nothing in the rules gives plaintiff this right and that if it doubts movant's good faith in answering any interrogatory, it has an appropriate remedy.

As to defendant motion picture producers, who are alleged as co-conspirators with defendant National Screen Service Corporation in violation of Section 1 of the Sherman Act, the Court overruled all objections to interrogatories on the ground of irrelevancy. In particular, on objection to an interrogatory seeking information as to proprietary interests of other defendants in National Screen Service Corporation, the court required that the names and addresses of former employees be furnished so that plaintiff might obtain the facts from them, and also ordered that each defendant answer the interrogatory insofar as it pertains to present employees.

Staff: Richard B. O'Donnell, John D. Swartz,
Walter K. Bennett and E. Winslow Turner.
(Antitrust Division)

Amended Complaint - Monopoly. United States v. United Fruit Company, (E.D. La.). On January 12, 1956, plaintiff filed an amended complaint in this action. The two principal new matters in the amended complaint relate (1) to defendant's activities in achieving a 100 per cent monopoly of imports of bananas on the West Coast, and (2) ten additional "exclusionary practices and unfair methods of competition" alleged to have been engaged in by defendant.

This amended complaint was filed without leave of court, pursuant to Rule 15(a) in view of the fact that defendant had not answered the original complaint.

Staff: Harold S. Glendening and Milton A. Kallis.
(Antitrust Division)

CLAYTON ACT

Section 7 - Proposed Corporate Merger. United States v. Brown Shoe Company, Inc. and G. R. Kinney Co., Inc., (E. D. Mo.) An ex parte restraining order entered on November 28, 1955, enjoined defendants from proceeding with a stockholders' meeting for the purpose of consummating a corporate merger, pending determination of plaintiff's motion for preliminary injunction. On January 13, 1956, Judge Rubey M. Hulen handed down a memorandum opinion which would result in dissolution of the restraining order and entry of a preliminary injunction permitting the stockholders' meeting but setting up eight conditions to prevent the merger of corporate assets or profits, to provide for independent management, and generally to maintain a situation in which effective divestiture might be achieved if on final hearing it is found that the proposed merger violates Section 7 of the Clayton Act.

In refusing to grant plaintiff's motion that the entire merger be enjoined, the Court acknowledged that the requirements for a preliminary injunction in a Section 7 case are very meager and that injury to the public is not a part of the Government's burden. It pointed out, however, that the Court would consider hardship to defendants without overlooking the status of the parties with a view to effective enforcement of an order should final judgment be adverse to defendants. The Court also concluded that the injunction, as requested, might prevent the merger even though final judgment might go against the Government and that no public injury was suggested if a preliminary injunction "as sought" was not granted.

In support of his refusal to grant the injunction as requested, Judge Hulen stated that plaintiff's case is weak "at this time" because it is based on affidavits by Government employees. The Court refused to accord equal probative value to such affidavits and to affidavits made by officers of the defendant corporations who have had years of experience in the shoe industry. Concerning the application of Section 3, Clayton Act Standards to Section 7 cases, the Court said: "We are not convinced the 1950 amendment eliminated the distinction so plainly delineated by the court. Nor are we disposed to follow plaintiff's suggestion and search the Congressional Committee reports and debates in an effort to find support for such a conclusion. Section 7 is now clear and definite in its terms and meaning.

Staff: James J. Coyle, Edward G. Gruis and Mark E. Fields.
(Antitrust Division)

INTERSTATE COMMERCE ACT

Issuance of Certificate of Public Convenience and Necessity to Railroad-Affiliated Motor Carrier. American Trucking Associations, Inc. et al. v. United States et al. (D.C. D.C.) On January 11, 1956 a three-judge Court in the District of Columbia (consisting of Judges Prettyman, Circuit Judge, and Pine and Holtzoff, District Judges)

unanimously dismissed the complaints attacking an order of the Interstate Commerce Commission in the above-captioned case. In its order, the Commission had authorized Rock Island Motor Transit Company, a wholly owned subsidiary of the Chicago, Rock Island & Pacific Railroad Company, to perform operations, unrestricted as to type of service, between Davenport, Iowa, and Omaha, Nebraska.

The two questions involved in the case were (1) whether the Commission has power to grant a certificate to a motor carrier subsidiary of a railroad without a restriction that the service shall be auxiliary or supplemental to the railroad service of the parent, and (2) if so, whether the findings of the Commission to the effect that the public convenience and necessity justified the grant were supported by substantial evidence. Two sections of the Interstate Commerce Act were involved. Section 5(2)(b) (49 U.S.C. 5(2)(b)) provides that whenever a railroad or its subsidiary is an applicant for approval of a merger or acquisition of a motor carrier, the Commission shall not approve unless it finds, inter alia, that the transaction will enable the railroad to use service by motor vehicle to public advantage in its operations. Section 207(a) (49 U.S.C. 307(a)) provides that a certificate shall be issued to any qualified applicant therefor if it is found, inter alia, that the proposed service is or will be required by present or future public convenience and necessity.

It is the policy of the Commission, in approving acquisitions of motor carriers by railroads, to restrict the motor carrier's operations to those which are auxiliary or supplemental to the railroad service of the parent company, in order to insure that the railroad will not use the motor carrier to restrain competition. The Commission applies the same policy in authorizing extensions of operations under Section 207, except where unusual circumstances warrant the issuance of an unrestricted certificate. The Commission found in the instant case that there were unusual circumstances present; that service in the affected area was inadequate; that the only remedy was to grant Motor Transit an unrestricted certificate, and that competition would not be restrained thereby.

Plaintiffs contended that the restrictive requirement of Section 5(2)(b), dealing with mergers and acquisitions, must be read into Section 207 and therefore prohibits the issuance of unrestricted certificates to railroad-affiliated motor carriers. The Court rejected this contention, holding that only the policy of Section 5(2)(b) need be applied in Section 207 proceedings, and that the resulting flexibility permits the Commission to be governed in exceptional circumstances by the needs of the public convenience and necessity. In holding that the findings were supported by substantial evidence, the Court agreed with the Commission's finding that the peddle operation performed by Motor Transit (i.e., the pickup and delivery of less than truckload shipments), standing alone, is not a profitable one and that the trend of motor carriers operating in Iowa has been to refrain from rendering this service; that the communities along the affected routes need the service; and that Motor Transit, already having rail-originated and intrastate traffic, can readily render this additional service.

Staff: James H. Durkin (Antitrust Division)

REPARATIONS

Jurisdiction - Sufficiency of Proof. Kentucky Gas Service, Inc. v. Southern Railway Co., Inc., U.S. & I.C.C. (W.D. KY.). On December 31, 1953, Kentucky Gas Service, Inc. filed a complaint with a three-judge court in the Western District of Kentucky at Louisville seeking to set aside an order of the Interstate Commerce Commission denying reparations for overcharges by the defendant Southern Railroad and the prescription of rates for the future. The United States filed a motion to dismiss the complaint on the grounds that (1) defendant had not named the proper parties before the I.C.C. in order to obtain a hearing on future rates, and (2) that the matter was therefore one of reparations and not within the jurisdiction of a three-judge court. Argument was held on the Government motion before District Judge Roy M. Shelbourne who ruled that the matter should be heard by the three-judge court on the jurisdictional point as well as the merits.

Hearing was held before the three-judge court on January 27, 1955, and on January 13, 1956 the Court ruled that the case was not one for a three-judge court but was for a one-judge court, and further that the proof was insufficient to establish the allegations of plaintiffs' complaint. Findings of fact and conclusions of law are to be filed within sixty days.

Staff: Willard R. Memler (Antitrust Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

CONDEMNATION

Just Compensation--Exclusion of Power Site Value on Navigable Stream--Conclusiveness of Congressional Declaration as to Purpose of Project. United States v. Twin City Power Company (Sup. Ct.). The United States condemned land on both sides of the Savannah River, a navigable stream, for use as a reservoir for the Clark Hill Dam. The land in South Carolina was owned by the Twin City Power Company and that in Georgia by its wholly owned subsidiary. Pursuant to Rule 71A(h), F.R.C.P., the issue of compensation was referred to three commissioners appointed by the two district courts having jurisdiction. The owners urged, and the district courts agreed, that the lands should be valued on the basis of their use in connection with the development of hydro-electric power from the Savannah River. The Government appealed to the Fourth and Fifth Circuits on the ground that the value of land as a potential power site on a navigable stream is not an element of just compensation under the Fifth Amendment. It relied principally on United States v. Chandler-Dunbar Co., 229 U.S. 53, 75-76.

The Fourth Circuit affirmed on the ground that the Chandler-Dunbar rule applied only when the land was condemned to improve the navigability of the stream. 215 F.2d 592. See Bulletin, Vol. 2, No. 19, p. 14. It also held that the dam was being built for flood control and power purposes rather than for the improvement of navigation.

The Fifth Circuit also affirmed, expressing its "full approval" of the opinion of the Fourth Circuit and stating: "Nothing in the facts or in the decision of the Dunbar case at all supports the claim which the United States here asserts." See Bulletin, Vol. 3, No. 9, p. 25.

By a 5 to 4 vote the Supreme Court reversed the decisions of the Courts of Appeals. The majority opinion, written by Mr. Justice Douglas, first emphasized the narrow scope of judicial review as to the legislative judgments in such cases and held that the Congressional determination that this project would serve the interests of navigation must be sustained. The opinion then concluded that the landowners had no right in the flow of the navigable stream and that it was the value of that right which was being sought in this case. It held that the Chandler-Dunbar case controlled this one. It emphasized that a claim for water power value in view of the dominant control of the Government represents an assertion of a private claim to the public domain, saying "What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys."

The dissenting opinion by Mr. Justice Burton did not controvert the ruling that this case was an exercise of the navigation authority but concluded that, even so, the power company was entitled to the compensation it claimed.

The result will be to reduce an award of \$1,257,033.20 to \$150,841.85.

Staff: Ralph S. Spritzer (Office of Solicitor General)
and Roger P. Marquis (Lands Division)

* * *

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

GROUP AWARDS

In addition to awards to individuals for specific, helpful suggestions or for sustained superior performance, it is possible to give the same to groups which, as teams, have rendered a consistently high standard of work. As an example, the regular and wholehearted cooperation of all members of a Marshal's office might be so outstanding as to justify a group award for the savings accomplished in prisoner transportation, which could not be recognized by individual awards. The combined efforts of members of a United States attorney's office, toward reducing backlogs of work, might likewise serve to support such an award. Such group efforts should be brought to the Department's attention in order to obtain proper recognition.

United States Attorneys and Marshals are encouraged to make recommendations. Specifically, the recommendations should outline the nature of services performed, the names of those in the group participating and the monetary savings accomplished or benefit derived by the Government. Such group suggestions will be considered and processed in the same manner as individual awards.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

ADMINISTRATIVE SUBPOENAS

No Authority to Subpoena Naturalized Citizen to Testify in Investigation Looking Toward His Own Denaturalization. United States v. Minker and Falcone v. Barnes (U.S. Supreme Court, January 16, 1956). These cases involved the interpretation of section 235(a) of the Immigration and Nationality Act, which provides in part that any immigration officer "shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers * * * relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States".

In Minker, the Court of Appeals for the Third Circuit held that the foregoing subpoena power was available for investigations directed toward denaturalization proceedings under section 340 of the Act but that Minker, a naturalized citizen who was himself the subject of the investigation, was not a "witness" within the meaning of the section and that the subpoena power therefore did not extend to him. In Falcone, the Court of Appeals for the Second Circuit held that section 235(a) permitted immigration officers to subpoena a naturalized citizen in furtherance of an investigation looking toward his own denaturalization. Because of these conflicting interpretations certiorari was granted. (For previous discussions of these cases see Bulletins, Vol. 1, No. 10, p. 18; Vol. 2, No. 26, p. 21 and Vol. 3, No. 2, p. 12.)

The Supreme Court affirmed the decision of the Third Circuit and reversed the Second Circuit. In a decision by Mr. Justice Frankfurter the Court held that the word "witness" as used in section 235(a) was ambiguous and that in view of the serious nature and results of denaturalization proceedings, doubts concerning the interpretation of the statute should be resolved in the citizen's favor. Contrasting the provisions of section 235(a) with other provisions of the Act, the Court concluded that Congress had not provided with sufficient clarity that the subpoena power granted by section 235(a) extends over persons who are the subject of denaturalization investigations; therefore Congress is not to be deemed to have done so impliedly. Since this is so, the decision stated, the Court was not called upon to consider whether Congress may empower an immigration officer to secure evidence, under the authority of a subpoena, from a citizen who is himself the subject of an investigation directed toward his denaturalization.

Mr. Justice Black and Mr. Justice Douglas filed separate concurring opinions.

Staff: Marvin E. Frankel, Assistant to the Solicitor General, argued these cases.

EXCLUSION

Due Process--Fair Hearing--Right to Counsel. Nicoloff v. Shaughnessy (S.D. N.Y., January 9, 1956). Habeas corpus to review an order excluding petitioner from admission to United States.

The alien arrived at New York on December 16, 1955 and was detained until December 19, 1955. On the latter date he was questioned by an examining immigration officer who thereafter notified him that he was temporarily excluded under section 235(c) of the Immigration and Nationality Act and that his application for admission, and any accompanying information he cared to submit within five days, would be referred to a Regional Commissioner for final decision. On December 22, 1955 the Commissioner finally excluded the alien on the basis of confidential information. On January 3, 1956, without notice to the alien, the Commissioner reopened the proceedings to consider documents submitted on behalf of the petitioner on December 22, 1955, and reaffirmed his excluding order.

The alien claimed that this proceeding violated due process and also section 6 of the Administrative Procedure Act because (1) he was entitled to counsel at the time of his interrogation by the examining officer and in connection with his preparation of material for submission to the Commissioner, and (2) that he was not accorded a fair hearing inasmuch as final determination was made prior to expiration of the five-day period allowed him to submit evidence.

The Court said that petitioner was not entitled to a hearing or to know the basis for the adverse decision in his case. He was entitled, however, to submit evidence to the Regional Commissioner before the latter's decision, and the Regional Commissioner's action excluding him prior to the expiration of the time allowed for that purpose was improper. This was not rectified by reopening of the proceedings without notice to the alien. The Court ruled, however, that the alien was not entitled to counsel either before the examining immigration officer or in the preparation of his statement and information for the Regional Commissioner. The Court also held that section 6 of the Administrative Procedure Act was not applicable.

The Court ordered that the writ be sustained unless the Regional Commissioner revoked the exclusion order and fixed a time within which petitioner may supplement his statement and the accompanying information before the Commissioner. If that action is taken, however, the writ will be dismissed.

DISPLACED PERSONS

Refugee Relief Act--Adjustment of Status--Fear of Persecution. D'Antonio v. Shaughnessy (S.D. N.Y., January 13, 1956). Petition to review decision denying adjustment of status under section 6 of the Refugee Relief Act of 1953, as amended.

Petitioners in this action are a family group of Italian nationals who applied for adjustment of status alleging inability to return to the country of their nationality "because of persecution or fear of persecution on account of race, religion, or political opinion." The claim was made that they could not return to Italy because of fear of persecution by Communists in that country arising out of the wartime activities of the father of the group to aid the United States armed forces in Italy. The application was denied as a matter of law on the ground that no claim was made that they feared persecution from the established government of Italy.

The Court held that the statute did not specify that the necessary persecution must be by the established government of the country to which an alien was to be returned, that the statute was remedial legislation, that it should not be narrowly construed, and that it should be given its ordinary meaning. If Congress had chosen to impose the qualification urged by the Government, it could easily have done so explicitly. The potential effects and dangers of persecution on a given individual may be equally serious whether the source of such persecution be the official government of a foreign country or powerful, though non-official, dedicated groups within that country. The Court, therefore, remanded the case for further proceedings before the Service to permit petitioners the opportunity to submit such evidence as they might have for administrative determination on the issue of "persecution or fear of persecution".

The Court discussed the decision in Lavdas v. Holland (see Bulletin, Vol. 4, No. 1, p. 23) and stated that if that decision was to be regarded as a holding that the necessary persecution under the statute must be by the de jure or de facto government of the foreign country or something tantamount thereto, then the court construed the statute differently than did the Judge in the Lavdas case.

NATURALIZATION

Residence--Spouse of Citizen--Meaning of "American Firm or Corporation". Petition of Judah (N.D. Calif., January 10, 1956). Greta Eileen Judah filed a petition for naturalization under section 319(b) of the Immigration and Nationality Act. That section provides in material part that a person may be naturalized without the usual requirement of residence within the United States, if the spouse of such person is a United States citizen employed by "an American firm or corporation engaged in whole or in part in the development or foreign trade and commerce of the United States. . .".

Petitioner's husband has been employed for many years by the Luzon Stevedoring Company Inc., a corporation organized under the laws of the Republic of the Philippines. The stock of the corporation is 53% American owned, but the company has no office or subsidiary organization in the United States. The company acts as a stevedoring contractor for vessels of various American steamship companies, and exports some Philippine products to the United States.

The Government recommended that the petition be denied on the ground that the Luzon Stevedoring Company is not an American corporation, and that it is not engaged in the development of foreign trade and commerce of the United States. The Court did not reach the latter issue, because it said the petition must be denied on the ground that petitioner has not shown that the Luzon Stevedoring Company is an American corporation within the meaning of section 319(b). The most that can be said for the corporation in question is that it is primarily American owned, but this does not bring petitioner within the terms of the statute. If Congress had meant to include American owned corporations, it could easily have said so; since it did not, the only meaning that the phrase "American corporation" can have is that it refers to a corporation organized under the laws of the United States, or its states, territories or possessions.

The petition was denied.

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OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

PRODUCTION OF DOCUMENTS

Supreme Court Will not Review Dismissal of Suit for Failure to Comply with Order for Production of Documents under Rule 34 where Production is Prohibited by Laws of Foreign Country. Societe Internationale v. Brownell, et al. (Supreme Court, denial of certiorari, January 9, 1956). This is a suit under Section 9(a) of the Trading with the Enemy Act by I. G. Chemie, a Swiss corporation, against the Attorney General, as successor to the Alien Property Custodian, for the return of vested property alleged to be worth more than \$100,000,000 (approximately 90% of the capital stock of General Aniline & Film Corporation). The District Court for the District of Columbia, per Chief Judge Laws, had ordered production of the papers of plaintiff's banking affiliate, H. Sturzenegger & Cie., which it found to be under the control of plaintiff. Prior to production, the Swiss Government seized the Sturzenegger papers in order to prevent a violation of the Swiss laws of bank secrecy and economic espionage. The District Court dismissed the complaint for plaintiff's failure to comply with the production order. 111 F. Supp. 435. The Court of Appeals affirmed but modified the dismissal by granting plaintiff a six months' period of grace, starting from the time of its mandate, within which to comply with the order. 225 F. 2d 532; see U.S. Attorneys Bulletin, Vol. 3, No. 15, p. 38 (July 22, 1955).

Plaintiff petitioned for a writ of certiorari on the ground that the District Court had adopted improper procedures in finding control and that the seizure by the Swiss Government made compliance with the court order impossible and therefore excused plaintiff. Defendants urged that the finding of control was amply supported by evidence in the record, that a prohibition of foreign law, and its implementation, may not serve as an excuse for noncompliance with a court order, and that the remedy of dismissal was within the Court's power and appropriate in the circumstances. On January 9, 1956, the Supreme Court denied plaintiff's petition.

Staff: James D. Hill, George B. Searls, Sidney B. Jacoby,
Paul E. McGraw, Ernest S. Carsten (Office of Alien
Property)

CONSTITUTIONALITY

Authority to Direct Action by Vested Corporation - Constitutionality of Trading with the Enemy Act. Brownell v. Schering Corporation (C.A. 3, January 17, 1956). In 1942, the Alien Property Custodian seized all the outstanding stock of Schering Corporation, a New Jersey pharmaceutical firm, as property belonging to Schering, A.G., a German corporation. At that time Schering held title to 215 patents in the pharmaceutical field which had been developed by its German parent and assigned to the subsidiary before the war. The Attorney General, as successor to the

functions of the Custodian, sold the shares in 1942 for approximately \$30,000,000. Preparatory to the sale, he issued a directive to the Corporation ordering it to enter into an agreement with him whereby the Corporation agreed to assign to the Attorney General for non-exclusive, royalty-free licensing, the 215 German-originated patents and to license to all qualified applicants at reasonable royalty rates 66 other patents and applications which had been developed by the Corporation during the period of its government ownership. After the sale the Corporation refused to perform its obligations under the agreement, and the Attorney General brought suit to enforce the agreement and for a declaratory judgment that it was valid and binding. The Corporation defended on the grounds that it had entered into the contract under duress, that the Attorney General's directive did not contain necessary jurisdictional findings, that the Act did not authorize the Attorney General to order the execution of the agreement, and that if it did, the Act was unconstitutional. The District Court rejected all these defenses and held that the action of the Attorney General was authorized by the Act and was proper in form, and that the Act was constitutional. See Bulletin, Vol. 3, No. 8, p. 34; Brownell v. Schering Corporation, 129 F. Supp. 879 (N.J.). On appeal the Third Circuit affirmed in a short per curiam opinion, in which it stated that it did not think it necessary to add to the opinion of the District Court.

Staff: United States Attorney Raymond del Tufo (New Jersey)
James D. Hill, George B. Searls, Joel H. Pullen
(Office of Alien Property)

TRUSTS

Right of Attorney General under the Trading with the Enemy Act to Seize Corpus of Charitable Trust. Central National Bank of Cleveland v. Brownell, et al (N.D. Ohio, January 17, 1956). Testator created a testamentary trust under which a trust company, plaintiff's predecessor, was bequeathed cash and securities as a "permanent" fund, the income of which was to be paid to the Gemeinde Haus, a German charitable institution. Subsequently, the Attorney General, acting under the Trading with the Enemy Act, seized and obtained possession of the corpus of the trust fund, as German-owned property.

The trustee brought suit for the return of the fund. The Trading with the Enemy Act provides that anyone not an enemy can recover his interest in vested property. The trustee contended that since the trust was perpetual and the beneficiary was entitled only to income, the Attorney General could not seize more than the interest of the German beneficiary.

On January 19, the Court filed an opinion granting defendants' motion for summary judgment saying, "while plaintiff is a 'non-enemy', it does not have beneficial interest in the property vested."

Staff: United States Attorney Sumner Canary (N.D. Ohio) James D. Hill, Walter Nolte, Westley W. Silvian (Office of Alien Property)

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