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UNITED STATES ATTORNEYS
BULLETIN

RESTRICTED TO USE OF

DEPARTMENT OF JUSTICE PERSONNEL

UNITED STATES ATTORNEYS BULLETIN

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CASE BACKLOG ! ! ! !

Deputy Attorney General Rogers stated in his remarks at the opening session of the last United States Attorneys Conference that he expected a 25% reduction in cases by the fiscal year ending June 30, 1956. A few districts have accomplished the goal. Many have made considerable headway. Some have a long way to go. As of December 31, 1955, only five districts have reduced the number of pending civil cases by 25% (since September 1, 1955). These districts are:

Alabama, Middle
Arkansas, Eastern
Illinois, Southern
Tennessee, Western
Texas, Northern

Forty-seven districts have accomplished some reduction. In thirty-six districts the pending case backlog has actually increased. Six districts reflect no change, including one district which has no civil cases.

In the corresponding period of time twenty-four districts have reduced their criminal backlog 25%. These districts are:

Alaska 1
Arizona
Arkansas, Eastern
Arkansas, Western
District of Columbia
Florida, Northern
Georgia, Middle
Idaho
Illinois, Eastern
Kentucky, Western
Louisiana, Western
Massachusetts
Mississippi, Northern
Montana
Nevada
New Mexico
North Carolina, Middle
Oklahoma, Northern
Puerto Rico
Tennessee, Middle
Texas, Southern
Utah
Virginia, Eastern
Wisconsin, Western

Twenty-two other districts reflect reductions but in forty-four others the number of cases pending has increased. Four districts report no change.

The Attorney General has asked that individual conferences be arranged soon after June 30 with the United States Attorneys who have not been able to effect the 25% reduction. We expect to bring out in these conferences the reasons for such failure and to develop methods to obtain the desired results.

* * *

ESTABLISHMENT OF ODM REGIONAL OFFICES

The Office of Defense Mobilization has recently established regional offices throughout the country to aid in coordinating emergency planning for government field establishments. Several United States Attorneys have already been contacted by these regional offices and others will be contacted in the near future.

Instructions and plans for the Department's needs with respect to field emergency planning are in process and will be sent out as soon as they are completed. In the interim if any inquiries or requests arise and require attention, please communicate with Mr. William F. Tompkins, Assistant Attorney General, Internal Security Division. The Attorney General has placed in Mr. Tompkins responsibility for all matters having to do with this program.

* * *

FEDERAL HOUSING ADMINISTRATION CLAIMS

As all United States Attorneys handle a substantial number of FHA claims, the record set out below of repayments on claims should be of special interest:

Loans Insured - July 1934 - September 1955		
Number		18,864,566
Amount Insured (net proceeds)		$8,895,086,000
Claims Paid by FHA - July 1934 - September 1955		
Number		555,078
Amount Claims Paid to Amount Insured	2.07%	$184,554,184
Recoveries on Claims Paid - July 1934 - September 1955		
Cash		$74,216,874
Cash Recoveries to Claims Paid	40.21%	
Estimated Future Recoveries		$19,642,300
Total Recoveries		$93,859,174
Total Recoveries to Claims Paid	50.86%	

Claims Paid Less Total Recoveries (Unrecovered Claims) $90,695,110
Unrecovered Claims to Amount Insured 1.02%

The foregoing shows that the net loss since the inception of the Title I program has been 1.02%. The accounts referred to United States Attorneys represent an exceedingly small number of borrowers who have failed to liquidate their obligations.

The following breakdown showing recoveries of Title I losses over the past five calendar years should be of special interest to United States Attorneys since it indicates that recoveries made by the Department of Justice over that period represented 12.8% of the total. The increase in the recoveries by the Department of Justice over these five years is, in a large degree, attributable to the vigorous collection program which was initiated during this period and to the emphasis placed upon the importance of striving for the ultimate in recovery of Government losses. It may be noted that before this program was launched the percent of recoveries by the Department was on a progressive decline.

Recoveries: (Calendar Years 1951 - 1955 Inclusive)

Fiscal Year	Gross Recoveries	Recoveries by FHA	Recoveries by D.J.	Percent F. H. A.	Percent D. J.
1951	$6,872,391	$6,053,746	$ 818,645	88.1	11.9
1952	7,852,845	6,927,149	925,696	88.3	11.7
1953	8,452,101	7,482,673	969,428	88.5	11.5
1954	7,830,170	6,734,879	1,095,291	86.1	13.9
1955	9,512,017	8,103,011	1,409,006	84.2	15.8
Totals	$40,519,524	$35,301,458	$5,218,066	87.2	12.8

The Federal Housing Administration has observed that if each United States Attorney will take aggressive action in accordance with previous instructions and bulletins, the Department of Justice may point with pride to its accomplishments in the handling of Title I accounts. Moreover, the experience gained in this aspect of civil work may well be used in the successful handling of civil matters submitted by other agencies.

* * *

INDEX OF JUDGMENT DEBTORS

The Department expects to establish by April 1st a revised collection system. The institution of the revised system in United States Attorneys' offices will require as a prerequisite thereto the establishment of an index of judgment debtors as set out in pages 15-20 of the Docket and Reporting

System Manual. A great majority of the United States Attorneys' offices already have such an index of judgment debtors. Those districts, however, who have not established such an index as directed in the Manual are advised to do so as soon as possible, in order that they may be ready for adoption of the revised collection system on April 1st or shortly thereafter.

* * *

NEW UNITED STATES ATTORNEY

Mr. Oliver Gasch's appointment as United States Attorney for the District of Columbia was confirmed by the Senate on March 1, 1956.

* * *

JOB WELL DONE

United States Attorney Herbert G. Homme, Jr., District of Guam, has received a number of letters from the Commander Naval Forces Marianas, the Staff Judge Advocate, as well as other Navy officials, expressing appreciation for his fine cooperation in the many matters handled by him for the Navy.

* * *

United States Attorney Raymond Del Tufo, Jr., District of New Jersey, has highly commended his Chief Assistant, Everett T. Denning, for his handling of the trial of a bribery violation involving an Immigration and Naturalization officer. The person to whom the bribe was alledgedly paid, for transmittal to the defendant, denied having received the money or having seen the alien from whom the bribe was solicited. Yet, by thorough pre-trial preparation and the ingenuity of Mr. Denning during the course of the trial, a favorable verdict was returned.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General William F. Tompkins

SUBVERSIVE ACTIVITIES

Smith Act - Membership Provision. United States v. Albert E. Blumberg (E.D. Pa.). On March 7, 1956, Albert E. Blumberg, national legislative director of the Communist Party of the United States of America, was convicted for membership in the Communist Party, knowing it to be an organization which teaches and advocates the overthrow of the United States Government by force and violence, in violation of 18 U. S. C. 2385. Blumberg's conviction is the third conviction secured against Communist Party functionaries for violation of the membership provision of the Smith Act. The two previous convictions have been affirmed in the Court of Appeals, Junius Irving Scales v. United States, 227 F. 2d 581 (C.A. 4) and Claude Lightfoot v. United States, January 12, 1956, (C.A. 7), and are pending on petition for a writ of certiorari in the Supreme Court.

Staff: David H. Harris and Joseph T. Eddins, Jr.
(Internal Security Division)

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CRIMINAL DIVISION

Assistant Attorney General Warren Olney III

ASSIMILATIVE CRIMES STATUTE

With this issue of the Bulletin there is being transmitted to all United States Attorneys a memorandum entitled "Operation of the Assimilative Crimes Statute in Federal Enclaves" by Marvin H. Helter of the Criminal Division, together with a memorandum on the constitutionality of the statute by Rex A. Collings, Jr., Chief of the General Crimes Section, Criminal Division.

* * *

CIVIL DIVISION

Assistant Attorney General Warren E. Burger

SUPREME COURT

FEDERAL POWER ACT
NATURAL GAS ACT

Contract Rate Cannot Be Changed by Unilateral Filing of New Rate Schedules Without Finding by Commission that Existing Rate is Unreasonable. Federal Power Commission v. Mobile Gas Corp. (Nos. 17 and 31), Federal Power Commission v. Sierra Pacific Power Co. (Nos. 51 and 53) (Supreme Court, Feb. 27, 1956). These two cases present the same question under parallel provisions of the Federal Power Act and the Natural Gas Act. In both cases, the regulated companies entered into contracts to sell gas or power at designated rates and then filed these contracts with the Federal Power Commission as required by the Natural Gas and Power Acts. During the terms of the contracts, and without consent of the purchasers, the companies filed new schedules with the Commission proposing increased rates, under Sections of the Acts which provide that "no change shall be made in any such [i.e., filed] rate * * * or in any * * * contract relating thereto" except after 30 days notice given by the filing of schedules. The Commission held hearings on the reasonableness of the newly filed rates. It ruled, in each case, that it was required to accept the schedules even though the existing rate was a contract rate and that, in fact, the filing of such schedules was the only way a regulated company could propose changes in an existing rate, contractual or not.

The Supreme Court (per Harlan, J.) unanimously disagreed with the Commission's view. It held that the statutes do not permit the alteration of contract rates by "unilateral" filings of new rate schedules by utilities. The Court reasoned that the purpose of the Acts was not to change the individual powers of utilities to make rates by contract but merely to require them to make rates subject to Commission review. Hence, held the Court, once filed in compliance with the notice and filing requirements of the Acts, a contract rate may be changed only by (a) the filing of a new schedule that has been agreed to between the parties and that conforms with the Acts' filing and notice requirements, or by (b) the finding by the Commission, pursuant to its review powers, that an existing rate is unreasonable.

In Sierra, the Court also ruled on the standard the Commission must follow for weighing the reasonableness of contract rates. It held that, if a company agrees to a rate producing less than a "fair"

return, the Commission can find such contract rate "unreasonable" only if it is so low as adversely to affect the public interest, not merely because it is unprofitable.

Staff: Howard Wahrenbrock (Federal Power Commission), Melvin Richter and Lionel Kestenbaum (Civil Division).

COURT OF APPEALS

GARNISHMENT

Pennsylvania Anti-Garnishment Statute Controls Right of United States to Garnish and Is not Applicable to United States Since not Applicable to State of Pennsylvania. United States v. Paul D. Miller and Mildred E. Miller, Appellants (C.A.3, Feb. 8, 1956). Appellants borrowed money from the United States under the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1001, et seq.). They defaulted in their obligation to repay. The United States obtained entry of judgment for the debt and, after failing in informal efforts to secure payment, served garnishment proceedings upon Paul Miller's employer. The District Court denied defendant's motion to quash the garnishment proceedings. The Court of Appeals affirmed, holding that the Government's right to garnish, under the provisions of Rule 69(a), Fed. R.Civ.P., is controlled by the Pennsylvania law of garnishment, notwithstanding the Government's contention that the right to garnish is substantive, not procedural, and hence controlled by federal law. The Court further held that, under the law of Pennsylvania, the State is not barred by the anti-garnishment statute from garnishing salaries and therefore the United States is likewise not barred.

Staff: United States Attorney W. Wilson White, Assistant United States Attorney G. C. Fogwell (E.D.Pa.) and Robert Mandel (Civil Division)

PROCEDURE

Leaseholders Whose Property Is to Be Condemned by City Found without Standing to Enjoin Federal Officials from Giving City Federal Funds to Aid Urban Renewal. Allied-City Wide, Inc. v. Albert M. Cole, et al. (C.A.D.C., March 1, 1956). Appellants, leaseholders whose property was about to be condemned by the City of New York, sought to enjoin the Administrator and Urban Renewal Commissioner of the Federal Housing and Home Finance Agency from paying about eight and a quarter million dollars to the City to aid in the redevelopment of the Washington Square Southeast area on the ground that such payment would be unlawful under Title 1 of the National Housing Act of 1949, for failure to follow certain procedural steps. Defendants moved for

dismissal of the complaint on three grounds: (a) that the City of New York was an indispensable party not joined, (b) that plaintiffs were not entitled to equitable relief since they would share in the compensation paid under condemnation proceedings, and (c) that plaintiffs lacked standing to sue. The District Court dismissed the complaint upon all three grounds. The Court of Appeals affirmed upon the last ground, not reaching the other two. The Court said per curiam, "One who will be injured by another's lawful use of money has no standing to assert that a third person's action in providing the money will be illegal."

Staff: United States Attorney Leo A. Rover and
Assistant United States Attorney Milton Eisenberg
(Dist. Col.)

RENEGOTIATION ACT

"Red Sea Charters" Held not Renegotiable. United States v. California Eastern Line, Inc. (C.A.D.C, Feb. 16, 1956). Early in 1941 the Maritime Commission assembled some 2,000,000 tons of merchant shipping, including an intercoastal steamship owned by California Eastern Line, for use by the British in sending military supplies to the Red Sea area. The Maritime Commission negotiated the terms of the charters with various shipowners and the freight and other charges thereunder were paid by the Commission from lend-lease funds. The formal charters were, however, executed by a representative of the British Ministry of War Transport since the United States was not then at war.

Acting pursuant to the provisions of the Renegotiation Act of 1942, as amended, the Commission determined that California Eastern Line, among other shipowners, had realized excessive profits from payments made under this "Red Sea Charter." The Tax Court (17 T.C. 1325) held that the charter was not renegotiable because it was made with a foreign government, not a "Department" of the United States. The Court of Appeals for the District of Columbia dismissed the Government's appeal of that decision on the ground that it did not have jurisdiction to review (211 F. 2d 635). The Supreme Court reversed, however, holding that the Tax Court decision in this case is "subject to the normal type of review authorized by Section 1141" (348 U.S. 351, 355). On remand to the Court of Appeals, that Court has now affirmed the Tax Court decision, agreeing that the charter was not entered into by a "Department" of the United States and hence was not renegotiable.

Staff: Frederick N. Curley (Civil Division)

TORT CLAIMS ACT

Civilian Caretaker Employee of National Guard Held "Employee of the Government" under Federal Tort Claims Act. Courtney v. United States (C.A. 2, Feb. 16, 1956). Plaintiffs sued the United States for damages sustained in a collision involving a Government owned vehicle bailed to the New York State National Guard and driven by a civilian caretaker employed by the State National Guard whose salary was paid by the United States. The District Court held that the employee was not an employee of the United States within the meaning of the Federal Tort Claims Act and accordingly dismissed the complaint. 126 F. Supp. 217; see U. S. Attorneys' Bulletin, Vol. 2, No. 26, p. 14. The Court of Appeals, stating its agreement with United States v. Holly, 192 F. 2d 221 (C.A. 10), and United States v. Elmo, 197 F. 2d 230 (C.A. 5), held that civilian caretaker employees of federally recognized but non-activated National Guard units are employees within the Tort Act, and reversed the District Court. The Court further stated that whether the civilian caretaker was a federal "employee" is wholly a federal question based upon federal statutory interpretation. Cf. Williams v. United States, 350 U.S. 857, as to "scope of employment" under the Act. Judge Lumbard dissented, on the ground that the State of New York, rather than the Federal Government, had the responsibility and authority to control the civilian caretaker's activities. The Federal Government, the dissenting judge pointed out, certainly should not be held "liable for the activities of every person into whose paycheck federal funds ultimately find their way."

Staff: United States Attorney Paul W. Williams and Assistant United States Attorney Alexander C. Cordes (S.D. N.Y.)

"Federal Agency" Interpreted; Member of Civil Air Patrol Held not "Employee of the Government" as Defined the Tort Claims Act. Larry Dean Pearl, et al. v. United States (C.A. 10, Feb. 8, 1956). Plaintiffs sought recovery from the United States for the death of their father in the crash of a Civil Air Patrol plane on loan from the Air Force. The plane was piloted by a CAP member and was on an official CAP indoctrination flight. The District Court granted the Government's motion to dismiss for failure to state a claim upon which relief could be granted on the ground that the CAP is not a "federal agency" and that consequently the CAP pilot was not an "employee of the Government" as those terms are defined in the Tort Claims Act, 28 U.S.C. 2671. The Court of Appeals for the Tenth Circuit affirmed, citing the act of Congress under which CAP was federally chartered as an independent, non-governmental entity. The Court further noted that CAP is neither a wholly-owned nor "mixed-ownership" government corporation under 31 U.S.C. 846 and 856, and that the legislative history of enactments subsequent to the act of incorporation, establishing CAP as a "volunteer civilian auxiliary" of the Air Force, showed that Congress did not intend thereby to make CAP a "federal

agency". The Court added that the fact that the plane was owned by the Air Force did not fix liability upon the Government under the statute, since it was operated by a person who was not an employee of the Government.

Staff: B. Jenkins Middleton (Civil Division).

Review of Findings of Fact-District Court's Findings of Negligence and Proximate Cause in Malpractice Action against United States Held Supported by Evidence. United States v. Amos R. Morin (C.A. 9, Jan. 31, 1956). Plaintiff sued the United States alleging that the negligence of Public Health Service doctors, in initial treatment of a compound fracture of his leg, resulted in failure of the bone to knit and osteomyelitis. Judgment was entered for plaintiff. The Government appealed, principally on the grounds (1) that plaintiff's medical testimony did not establish that his treatment by Goverment doctors was improper, but, on the contrary, indicated that there is a wide difference of opinion in the medical profession as to the treatment of this type of injury and that the treatment afforded conformed to one of these views; and (2) that his treatment by his own physician-who was also his sole expert witness-showed that the infection had not developed as early as he testified, and that it was therefore most improbable that it was proximately caused by the treatment of Goverment doctors. The Court of Appeals affirmed the decision, finding that, while there was evidence to the contrary, there was evidence that the treatment did not meet reasonable standards of due care and professional skill, that the treatment greatly increased the danger of infection, and that there was infection at the time plaintiff began to receive private treatment.

Staff: United States Attorney Clarence E. Luckey.

Scope of Employment-Soldier Driving Own Car En Route to New Duty Station Pursuant to Army Orders Found within Scope of Employment. United States v. Harold Kennedy (C.A. 9, Feb. 1, 1956). Appellee was injured in an automobile collision involving a car owned and driven by an Army sergeant. The Government admitted that the sergeant was travelling pursuant to orders requiring him to report to his new station and authorizing the use of his private vehicle if he so desired for which he would be reimbursed; but, the Government argued that he was not acting within the scope of his employment because the use of his own vehicle was for his personal convenience only and not in the interest of the United States. The Court of Appeals, basing its decision upon the law of the State of Washington, rejected this contention, holding that since the Government admittedly had an interest in having the sergeant report to his new duty station, this interest was being served at the time of the accident by his travelling in that direction and the fact that he was also serving his own interest in using his car to perform the journey was immaterial.

Staff: Julian H. Singman (Civil Division)

VETERANS ADMINISTRATION

Servicemen's Indemnity Act of 1951 - Jurisdiction to Review Veterans Administration Denial of Indemnity Cannot Be Based on Administrative Procedure Act. Ford v. United States (C.A. 5, Feb. 29, 1956). The Court of Appeals, following its earlier decision in Acker v. United States, 226 F. 2d 575, holds again that there is no jurisdiction in the District Courts to entertain claims against the United States to recover the $10,000 gratuitous indemnity provided for servicemen's survivors by the Servicemen's Indemnity Act of 1951. In addition, the opinion rejects the contention that the correctness of the Veterans Administration denial of the gratuity is reviewable under the Administrative Procedure Act. Section 10 of the latter Act, the Courts points out, specifically excepts administrative actions where the statutes preclude judicial review. The Court, relying on the fact that the 1951 Act provides a "pure gratuity from the sovereign's grace" and on the provisions of 38 U.S.C. 11a-2, which makes Veterans Administration determinations final and conclusive, found a clear Congressional intent to preclude judicial review of administrative action under the 1951 Act.

Staff: Morton Hollander (Civil Division).

COURT OF CLAIMS

CONTRACTS

Misrepresentations - Discovery of Errors by Contractor. Anthony M. Meyerstein, Inc. v. United States (C. Cls., Jan. 31, 1956). Claimant entered into a contract with the Navy for the construction of floating cranes. The drawings which had been part of the Government's invitation to bid contained an error. However, before it bid, claimant noticed the error, and failed to call it to the Government's attention, despite an admonition in the invitation that all errors noted should be promptly reported to the Government. Claimant's bid was unqualified by any exception on account of the error. On claimant's subsequent suit for damages resulting from the error, the Court held that claimant was precluded from basing any claim thereon. It held that "where the aggrieved party knows the actual state of affairs, representations contrary to the fact cannot be construed as warranties."

Staff: Bruce G. Sundlun and John F. Wolf (Civil Division).

GOVERNMENT EMPLOYEES

Reductions-in-Force - Promotions. Bortin v. United States (C. Cls., Jan. 31, 1956). Claimant, an employee of the Veterans Administration, was demoted in a reduction in force. He contended that he should have been given another position of equal rank and pay,

and sued for the difference in salary. The Court overruled the contention, holding that the other position was not on the same competitive level, the duties and responsibilities being different. Claimant's additional contention that subsequently the agency wrongfully failed to promote him was also rejected, the Court holding that promotion is the prerogative of the agency, not the Court. "It is still true, fortunately, that 'promotion is the prerogative of an agency so long as the employee promoted meets the requirements for the position to which promoted.' It would be quite detrimental to the public service if an agency head had no discretion in selecting men to do important jobs. He is already circumscribed more than a little in his control over his subordinates. Further restraint upon him would be unwise."

Staff: Edward L. Metzler (Civil Division).

Illegal Demotions - Reinstatement Proceedings in District Court - Statute of Limitations. Ball, et al. v. United States (C. Cls., Jan. 31, 1956). Claimant veterans, employees of the Philadelphia Naval Shipyard, were demoted. Pursuant to a temporary mandatory injunction of the District Court, they were reinstated to their original grades. Shortly after the ultimate termination of the District Court proceedings, claimants sued in the Court of Claims to recover their back salaries. By that time, more than six years (the statutory period for instituting Court of Claims suits) had elapsed since their original demotions, but claimants contended that their causes of actions had not accrued until the District Court proceedings had terminated, and that in any event, the statute of limitations was tolled while the District Court suits were pending, since a special statute (28 U.S.C. § 1500) specifically prevents Court of Claims suits from being filed while a District Court suit is pending. The Court overruled both of claimants' contentions and dismissed the petition. It held their causes of action accrued when they were illegally demoted, and that the District Court suit did not serve to toll the statute of limitations applicable to filing suits in the Court of Claims.

Staff: LeRoy Southmayd, Jr. (Civil Division)

JUST COMPENSATION

Closing of Gold Mines During War Held to be "Taking". Central Eureka Mining Company, et al. v. United States (C. Cls., Feb. 20, 1956). During the war, the War Production Board issued a "Limitation Order" which required certain non-essential mines to close down and cease all mining operations. Under this Order, gold mines could not mine or sell gold for the duration of the war. Over 150 gold mine owners instituted suit in the Court of Claims for just compensation under the Fifth Amendment, contending that the closing of their mines constituted a "taking" by the Government entitling them to payment. In this test case, the Court, in a 3-2 decision, agreed with the gold

mine owners. It held, among other things, that the prohibition of gold mining was not "reasonably calculated to" nor did it "in fact increase the country's war efficiency," and that it was an arbitrary act depriving the gold mine owners of their right to make profitable use of their properties, constituting not a valid war regulation but "in substance a taking for which the Government is liable to pay just compensation." The Court concluded that it would have been lawful, by proper allocation orders, to prevent the gold mines from acquiring new materials and equipment, and that to the extent such an order would prevent a mine from continued operation, the damage resulting therefrom would be consequential and not compensable. It held, however, that to the extent that the mines could have operated with existing inventories and equipment, the Order illegally interfered with a valuable property right and constituted a temporary taking of such right. One Judge dissented on the ground that, even though that part of the Order which closed the mines was unauthorized and invalid, other parts of the Order which forbade the use of critical materials in non-essential industry were valid and would have caused the mines to close down anyway. A second Judge dissented on the ground that there was no right to close the gold mines, that it was, therefore, an illegal act which could have been enjoined, and that unauthorized acts of Government officials are not compensable under the Fifth Amendment.

Staff: Kendall M. Barnes and Thomas H. McGrail (Civil Division).

DISTRICT COURTS

FOREIGN ASSETS CONTROL REGULATIONS

Foreign Assets Control Procedures for Determining Country of Origin of Cassia (cinnamon bark) Upheld. Karl H. Landes and E. Balint, Inc. v. George M. Humphrey, et al. (D.C.D.C., Feb. 13, 1956). Plaintiff, spice importer, brought this action to secure the release of 1300 bales of cassia, or, alternatively, a reexamination of the bales by "such persons as might be fair, competent, impartial and qualified". These bales had been denied entry into the country under the provisions of the Foreign Assets Control Regulations (31 C.F.R. 500.204) on the ground that they were not of non-Chinese origin. The bales had been examined by a panel of spice industry experts the majority of whom had found them not to be of non-Chinese origin. The regulations prohibited the granting of an import license for cassia of Chinese origin.

Plaintiff moved for summary judgment contending that the procedure set up for testing cassia was arbitrary and capricious; that a different determination, the volatile oil content of cassia bar, should have been relied on by the Treasury; and that a reexamination of the bales in question should have been permitted. In granting the Government's cross-motion for summary judgment the court held that defendants were not arbitrary or capricious in setting up the procedures for determining the country of origin of cassia or in execution of those procedures with respect to the bales in question;

or in refusing to accept the volatile oil content of cassia bark as the basis for determination of its country of origin; or in denying entry into the country of the bales in question; or in refusing to permit a reexamination thereof.

Staff: United States Attorney Leo A. Rover; Assistant United States Attorney Robert L. Toomey (Dist. Col.); Edwin F. Rains, General Counsel, Foreign Assets Control; Edward H. Hickey and Andrew P. Vance (Civil Division).

JUDGMENTS

Enforcement of Railroad Retirement Board Lien - Government Must First Exhaust Remedy against Recipient of Benefits. United States v. Atlantic Coast Line R.R. Co. (E.D.N.C., Nov. 1955). Mary Lou Mintz, disabled by negligence of the railroad, collected $1,105 in "sickness benefits" under the Railroad Unemployment Insurance Act. When she later recovered judgment against the railroad for a much larger sum, the latter paid her in full, although it had received notice under 45 U.S.C. 362(o) to deduct the $1,105 and pay that to the Board. The Government sued the railroad, which brought in Mintz. Judgment was rendered against both of them; but the Court, over the United States Attorney's protest, entered an order requiring the United States to proceed against Mintz's assets first.

Staff: United States Attorney Julian T. Gaskill, Assistant United States Attorney Irvin B. Tucker, Jr. (E.D.N.C.) Robert Mandel (Civil Division)

SOCIAL SECURITY ACT

Telephone Conversation as "Application for Benefits" Under Act. Medalia v. Folsom (135 F. Supp. 19 (D. Mass.)). Plaintiff, a retired armed forces medical officer, filed formal application in January 1954 for Social Security benefits based solely on credits allowed for his military service pursuant to 42 U.S.C.A. 417 (a)(1). The law requires an "application" for benefits (42 U.S.C.A. 402 (a)). Social Security Administration regulations (20 C.F.R. 403.701 (k)(1)) provide that when an oral or written intention to claim benefits is made to Social Security officials, the latter shall make an appropriate record in all cases where "some possibility of entitlement exists." This record can later be deemed an application filed in the regular manner.

Plaintiff claimed that in April 1951 he telephoned a local Social Security office to inquire about his rights and was told he was not eligible. No office record was made of the call. Plaintiff later established his eligibility, and contended that benefits should run

from a date fixed by the April 1951 "application". In denying this contention, Judge Ford (opinion dated October 18, 1955) pointed out that while the regulation allows an oral communication to be considered an "application" under appropriate circumstances, it must be more than a mere request for information, and must express an intention to make a claim, which was not true of plaintiff's telephone conversation. The judge also rejected an argument that defendant was estopped from denying plaintiff's claim, stating that estoppel may not be asserted against an agency of the United States.

Staff: United States Attorney Anthony Julian, Assistant United States Attorney Arlyne F. Hassett (D. Mass.)

TORT CLAIMS ACT

Child, Fatally Injured on United States Property While "Trick or Treating" Owed Duty of Care as Licensee Only. State of Maryland, to Use of Cecil Forrester, etc. v. United States (D. Md., Feb. 14, 1956). Suit was brought to recover $50,000 and costs for the death of the 7 year old infant son of the use plaintiffs. On October 30, 1953 the infant was on a "trick or treat" expedition with three other boys, one of whom rapped at the door of a tenant of the United States on property known as Victory Villa Gardens. The building was owned by the United States and controlled by the Public Housing Administration. When the door to the premises was opened the decedent stepped back to the edge of the step, lost his balance and fell into an empty coal bin adjacent to the steps, and apparently landed on his head on the ground inside the coal bin approximately 48 inches from the stoop upon which he had been standing. Death was caused as a result of cerebral edema due to a skull fracture and craniopharyngioma of the pituitary (brain tumor). On these facts, the Court found that the plaintiffs' decedent was a licensee, and under the Maryland law the only duty of the United States was not to wilfully injure him or entrap him. The Court found that the coal bin, in the condition it was at the time of the accident, did not constitute a trap.

Staff: United States Attorney George Cochran Doub, Assistant United States Attorney Herbert F. Murray (D. Md.) John J. Finn (Civil Division).

Failure of Government to Exclude Shipment of Adulterated Imported Food Products under Authority of Pure Food, Drug and Cosmetic Act Did not Create Actionable Duty to Intermediate Dealer. Anglo-American and Overseas Corporation v. United States (S.D.N.Y., Feb. 9, 1956). Plaintiff, a merchant, agreed to buy certain lots of tomato paste which were to be imported if the Government did not exclude them pursuant to the Pure Food, Drug and Cosmetic Act. The lots were sampled and the shipment released. The release notice to the importer stated that each lot "need not be further detained insofar as Section 801" of the Act was concerned. After release the tomato paste was

tendered to the Army, the ultimate purchaser. The adulterated condition of the food was then discovered and the Government refused to accept delivery. The entire shipment was thereafter condemned and destroyed.

Plaintiff's suit under the Tort Claims Act was based on the original failure to reject the paste as an import, no question being raised as to its adulterated condition or to the right to confiscate and destroy the food product. The United States moved to dismiss on the grounds that it owed no duty to the plaintiff, and that even if a private person might be liable in the circumstances, the claim was barred by the discretionary function and misrepresentation exceptions, 28 U.S.C. 2680(a) and (h). The Court held that the duty imposed by the Pure Food, Drug and Cosmetic Act was one owing primarily to the ultimate consumer and not to an intermediate dealer (citing United States v. Sullivan, 332 U.S. 689), and that therefore even though "defendant were a private person it would not be liable to plaintiff for the negligent performance of a duty primarily owed to someone else."

The Court noted the apparent incompatibility of Indian Towing Co. v. United States, 350 U.S. 61 with Dalehite v. United States, 346 U.S. 15, and did not pass on the contention that the manner and extent of testing food samples was a discretionary function or duty. It held that in any view of the matter "plaintiff could not have been injured here but for the implied representation that the tomato paste did not violate the Act which it read into the form release notice issued . . .", and that the exception, 28 U.S.C. 2680(h), extends to negligent as well as willful misrepresentations, citing Jones v. United States, 207 F. 2d 563; National Mfg. Co. v. United States, 210 F. 2d 263; and Clark v. United States, 218 F. 2d 446. Accordingly, the complaint was dismissed.

Staff: Assistant United States Attorney Amos J. Peaslee, Jr. (S.D.N.Y.); Massillon M. Heuser (Civil Division).

Filing of Administrative Claim not Signed by Claimant and in Excess of $1000 Held Insufficient to Satisfy Statute of Limitations. Lillian Malin v. United States (N.D. Ill., Oct. 18, 1955). On June 22, 1953, plaintiff filed suit under the Federal Tort Claims Act to recover damages for personal injuries as the result of an intersection collision in Chicago, Illinois on February 5, 1951. An administrative claim in the amount of $3,500 had been submitted to the Post Office Department on August 25, 1951. However, Standard Form 95, presenting the administrative claim, was not signed by the claimant but by her attorney. By letter dated April 21, 1953, claimant sought to withdraw the claim from administrative consideration. The Court held the suit barred by the statute of limitations, 28, U.S.C., 2401(b), because of failure

to present a valid claim for administrative consideration within two years after date of accrual. The attempted administrative claim of August 25, 1951 was held a nullity as it was in excess of $1,000 and was not signed by claimant. Later attempted reduction of the administrative claim to $1,000 did not revive it since it had already been barred. The Court cited Marino v. United States, 82 F. Supp. 190, 192 (D.C. S.D. N.Y., 1948). See also Siciliano v. United States 85 F Supp. 726, 731, 732 (D.C. N.J., 1949) to the same effect.

Staff: United States Attorney Robert Tieken (N.D. Ill.)
Irvin M. Gottlieb (Civil Division).

Recovery Barred where Plaintiff Was Warned of Danger in Work to Be Performed for Navy. Mayfield, et al. v. United States (N.D. Calif., Jan. 30, 1956). Plaintiff, an employee of an independent contractor, incurred acid burns while attempting to replace and secure acid drain lines at the Mare Island Naval Shipyard, Vallejo, California on August 6, 1952. Plaintiff sued to recover damages in the amount of $50,000.00. Plaintiff was an experienced plumber and pipe fitter. Prior to the commencement of this particular job, he was thoroughly briefed on the dangers involved, namely, the presence of acids in certain storage tanks and pipe lines leading therefrom. In addition to this oral warning, the presence of the acid was made obvious by signs and other visual means. Notwithstanding these warnings, plaintiff loosened the bolts of a flange which held two pipes together, causing the flange to part and drop half an inch, thus liberating the flow of acid from a storage tank which spilled down on him. Plaintiff contended that he was an invitee on the premises and that the Government had been negligent in not warning him of dangers that were not readily apparent to the eye. The Court concluded that plaintiff was given ample warning of the existence or the possible presence of acid in the storage tanks, and any lead pipes which he might encounter. The Court concluded as a matter of law that plaintiff had failed to sustain the burden of proving conduct on the part of the Government amounting to negligence, and further that the evidence disclosed that plaintiff's own conduct in the face of a known danger amounted to contributory negligence of such degree as to bar his recovery.

Staff: United States Attorney Lloyd H. Burke,
Assistant United States Attorney Frederick J. Woelflen (N.D. Calif.); James B. Spell (Civil Division)

Under Maryland Law U.S. May Counterclaim against Joint Tortfeasor if no Common Liability. Patricia Ann Zaccari, Infant, etc. v. United States. (D. Md.). A six year old girl, a passenger in an automobile driven by her father, was injured in a collision with a Government vehicle. Suit was commenced against the United States

under the Federal Tort Claims Act by the father individually and as next friend of the infant. The Government answered and filed a counter-claim against the father, alleging negligence on his part, and claiming contribution from him for his share of any amount awarded the infant plaintiff. The Court granted the father's motion to dismiss the counter-claim, holding that prosecution thereof would be tantamount to permitting the child to sue its father in tort. In reaching its decision the Court also held that the Government's right to obtain contribution from a joint tort feasor depends upon local substantive law, citing United States v. Yellow Cab Company, 340 U.S. 543; that the right of contribution is controlled by statute in Maryland, and the statute is "only applicable to a situation where there is a common liability to an injured person in tort"; and that Maryland has recognized the general rule that an unemancipated infant can not sue his parent for damages for the parent's negligence. Therefore, the court concluded that the Government's counter-claim could not be maintained although federal procedural law authorized the assertion of such a claim by means of counter-claim as by third-party complaint or independent proceeding. The case points up the lack of any provision in the Federal Tort Claims Act respecting joinder and contribution. An opposite result was reached in Di Benedictus v. United States, (W.D. Pa.), 103 F. Supp. 462, where state law permitted contribution in a similar situation.

Staff: United States Attorney George Cochran Doub, Assistant United States Attorney Herbert F. Murray (D. Md.); M. M. Heuser (Civil Division).

* * *

TAX DIVISION

Acting Assistant Attorney General Charles K. Rice

Liaison Committee--Tax Division and Chief Counsel's Office

The Assistant Attorney General in charge of the Tax Division and the Chief Counsel of the Internal Revenue Service have created a permanent liaison committee to consider inter-agency problems concerning the civil administration and enforcement of the internal revenue laws. The more highly specialized criminal enforcement will continue to be handled directly with the Chief Counsel's office.

The committee, which meets regularly each month (oftener if necessary), will work from an approved agenda, although matters not on the agenda may be discussed when advisable.

United States Attorneys are invited and urged to present to the Assistant Attorney General, Tax Division, any matter which is considered appropriate for discussion by such a group.

Solutions to problems and other decisions arrived at by the committee will be disseminated to United States Attorneys and the staff of the Tax Division at regular intervals.

CIVIL TAX MATTERS
Appellate Decisions

Documentary Stamp Tax--Bonds, Debentures and Certificates of Indebtedness Issued by Corporation. United States v. Leslie Salt Co. (U. S. Sup. Ct.), March 5, 1956. In this case the Supreme Court has finally determined an issue involving the federal documentary stamp tax imposed by Sections 1800 and 1801 of the Internal Revenue Code of 1939 (now Sections 4311 and 4331--see, also, Section 4381--of the 1954 Code) which has been the subject of considerable litigation since the decision of the Court of Appeals for the Second Circuit in General Motors Acceptance Corp. v. Higgins, 161 F. 2d 593, certiorari denied, 332 U.S. 810, and which is involved in a number of cases now pending in the lower courts.

On February 1, 1949, Leslie Salt Company, being in need of funds to meet maturing bank loans and for working capital, borrowed $4,000,000, of which $3,000,000 was borrowed from Mutual Life Insurance Company of New York and $1,000,000 was borrowed from Pacific Mutual Life Insurance Company, each loan being evidenced by a single "3 1/4 per cent Sinking Fund Promissory Note Due February 1, 1964", issued by the Company, both of which were identical in all respects except as to amount and identity of the lender. Each loan was made, and the amount thereof was repayable over a 15-year period, pursuant to separate but identical underlying loan agreements simultaneously executed by the borrower and

the lenders which contained elaborate provisions for the protection of the lenders, plus a further provision that the insurance companies could require Leslie Salt Company to convert its notes, which were typewritten on ordinary white paper, into a series of new notes in denominations of $1,000 or multiples thereof, "either in registered form without coupons or in coupon form, and in printed or in fully engraved form". By the underlying loan agreement, which in terms was an agreement by Leslie Salt to "sell" and an agreement by the insurance companies to "purchase" the notes, Leslie Salt agreed, among other things and obviously for the protection of the lenders, to pay all its taxes, keep its property in repair, keep accurate records, insure its properties, make regular financial statements to the holders of the notes, not to become indebted except as would be necessary in ordinary course of business, not to pay dividends or retire stock except as provided in the agreement, not to change the nature of its business or let its working capital decline below a specified amount, and to repay at least $285,000 of the principal amount each year, without premium, with a proviso that it could at its option prepay an additional principal amount of $285,000 each year without premium so long as the prepayment came from earnings or liquidation of assets. Leslie Salt also had the right to make further prepayments of principal, but subject to a premium of 3 per cent, which after the first three years of the note decreased in amount at the rate of 1/4 per cent each year.

The "notes" involved in this and similar cases, evidencing long term capital loans privately negotiated with banks, insurance companies, and other financing institutions, are commonly referred to as term notes. This method of corporate financing, as distinguished from the public issue of bonds, debentures, and certificates of indebtedness, is of comparatively recent development, for reasons pointed to in this and several lower court opinions, and the Commissioner of Internal Revenue has for several years taken the position that instruments evidencing long term loans of the type here involved are subject to the documentary stamp tax imposed on the corporate issuance of bonds, debentures and certificates of indebtedness.

In rejecting the Government's contentions in the Leslie Salt Co. case the Supreme Court seems to have drawn a distinction between instruments evidencing long term corporate financing through privately negotiated loans and corporate financing effected by means of publicly issued bonds, debentures, or certificates of indebtedness.

Staff: John F. Davis (Solicitor General's Office)
Frank E. A. Sander, and Fred E. Youngman (Tax Division)

Depletion Deduction--Economic Interest Possessed by Adjoining Landowner Who Receives Share of Net Profits from Lessee. Commissioner v. Southwest Exploration Co.; United States v. Huntington Beach Co. (U.S. Sup. Ct.), February 27, 1956. Southwest Exploration Company is

the lessee of oil and gas wells under a lease granted by the State of California with respect to submerged lands lying off the coast line. Under state law, the wells were required to be drilled on a slant, from and through the land adjoining the coast. Southwest Company obtained the necessary rights of way and easements from adjoining property owners in consideration of its agreement to pay them a total of 24 1/2 per cent of its net profits from the operation of these wells.

The issue concerned the depletion deduction on the net profit payments which were paid to the upland owners. It was agreed that those payments were subject to depletion either by the lessee or the upland owners, but not by both. The Ninth Circuit, affirming the Tax Court, held that the lessee was entitled to the deduction, it being reasoned that the upland owners did not acquire an economic interest in the oil and gas in place. The Court of Claims, however, in a case involving one of the upland owners, Huntington Beach, disagreed; it held that to the extent that the lessee had undertaken to pay them a portion of its net profits from operations, it had given them the requisite economic interest to support the depletion deduction.

The Supreme Court granted certiorari to resolve this conflict. Upholding the Government's position and agreeing with the Court of Claims, the Court held that the upland owners were entitled to the deduction on the payments they received and that the lessee must exclude those payments from its depletion base.

Although, in all prior cases decided by the Supreme Court, the party given the right to depletion possessed or had formerly possessed an interest originating with the right to exploit the mineral deposits, and although the upland owners here never did possess such rights, the Court held that, in the particular circumstances here, this factor was not conclusive. The opinion points out that it was essential to the lessee to use the property of the adjacent landowners. "Without their participation there could have been no bid, no lease, no wells and no production." Having granted the use of their property in exchange for a right to share in the profits from production, the upland owners' "contribution was an investment in the oil in place sufficient to establish their economic interest."

Staff: Hilbert P. Zarky (Tax Division)

District Court Decisions

Civil Fraud Case - Government Assumes and Discharges Burden of Proof. Fairchild v. United States (S.D. Miss.) Taxpayer was the owner and operator of a combined restaurant, bar and gambling establishment on the Mississippi Gulf Coast. His books and records for the restaurant and bar were good, but those for the gambling establishment showed only his net monthly gains. His income for 1945 through 1952 was recomputed by the net worth method. In this civil action for refund of

the resulting deficiency and so-called fraud penalty for 1945, the taxpayer claimed that the agents failed in their net worth to give him credit for $45,000 in cash in a safe deposit box and for several other specific items of property. The assessment was barred by limitations unless the taxpayer committed fraud in filing the return.

The Court ruled that the Government had the burden of proving fraud; that this burden had been discharged, and that, in addition to the presumption of correctness as to the tax deficiency, the evidence supported the correctness of the tax and net worth.

Staff: Assistant United States Attorney Edwin R. Holmes, Jr. (W.D. Miss.); Carrington Williams (Tax Division).

Family Partnerships - Equitable Estoppel - Informal Settlement Held Binding on Taxpayers In Refund Suits. Adolph Schein v. Kelm, Coll.; Robert S. Schneider v. Kelm, Coll. (D.C. Minn.). Taxpayers had been operating a large dress manufacturing business. They made "gifts" of one-half of the stock in the business to their wives and then formed a partnership with the wives. The Commissioner disallowed the wives as partners and was sustained by the District Court, which held that the wives rendered no services and that the purported capital contribution of the wives served no business need and earned no part of the business income. This was in direct conflict with the testimony of the taxpayers and their wives.

Of considerable interest is the Court's decision that an equitable estoppel would have barred a portion of taxpayers' suits even if they would have been entitled to recover on the merits. The statutory provisions for settlement by closing agreements are very cumbersome and, therefore, are rarely used. As a practical matter, many cases are settled by examining or reviewing agents on the basis of mutual concessions and assessment of lesser deficiencies than were originally contemplated. In connection with such settlements, taxpayers customarily execute Treasury Form 870 (Waivers of Restrictions on Assessment and Collection of Tax), which frequently contain a special promise not to file or prosecute claims for refund of taxes involved. From time to time taxpayers have reneged on such agreements and suit for refund of taxes so paid. The Government has been unsuccessful in relying on the form as a bar to such suits. These cases involve such a repudiation of a promise not to file claims for refund or to sue. The Court held that the Government was entitled to rely on taxpayers' representation of fact that the cases would remain closed and that if, in such reliance, it permitted the statute of limitations to run without assessing the total tax which was originally proposed, the settlement would be binding and taxpayers could not thereafter repudiate their position to the Government's detriment.

Staff: Assistant United States Attorney Alex Dim (D. Minn.); Kurt W. Melchior (Tax Division)

Excess Profits Tax - Personal Holding Company Not Entitled to Carry Back Unused Excess Profits Credit - American Valve Co. v. United States (S.D. New York). Taxpayer corporation had paid excess profits taxes for the years 1942 and 1943, but entered into an agreement with a partnership - composed of its two principal stockholders and members of their families - under which the property of the corporation was leased to the partnership. During 1944 and 1945 the corporation's principal income was rent from this partnership, but nonetheless the corporation sought to carry back its unused excess profits credit for those years as an offset against the excess profits taxes it had paid for 1942 and 1943.

The Government resisted this claim on the ground that the corporation was a personal holding company during 1944 and 1945, and that a personal holding company was not entitled to carry back unused excess profits credits. The taxpayer denied that it was a personal holding company, urging that while its two principal stockholders had a 35% interest in the partnership, neither of them had a 25% interest in the partnership. Taxpayer also urged that a personal holding company was entitled to an unused excess profits credit carry-back. The Court refused both contentions of the taxpayer, holding that the corporation was a personal holding company and agreed with an earlier decision of the Court of Claims, that a personal holding company was not entitled to the carry-back.

Staff: Assistant United States Attorney Morton S. Robson (S.D. N.Y.).

Estate Tax - Marital Deduction not Available in Case of Trust Life Estate Together with Broad Power of Invasion of Corpus.--Grace M. Matteson, as Surviving Executrix of the Last Will and Testament of Edward M. Markham v. United States. (N.D. N.Y.). Testator left the residue of his estate to a testamentary trust. The trustees were to pay the net income to the surviving spouse for life. The will further provided that " *** should my wife *** ever at any time or times find that the income received by her from the Trust herein created for her benefit is not sufficient, and of its sufficiency she shall be the sole judge, my said trustees, upon a request by her in writing, shall pay to her so much of the said trust fund as she shall desire, and her receipt for the same shall be a full acquittance therefor."

Estate contended that this disposition gave the spouse a trust life estate with a power of appointment so as to permit a marital deduction under Section 812(e)(1)(F) of the Internal Revenue Code of 1939. The estate relied upon Matter of Woollard, 295 N.Y. 390, as establishing the extreme breadth of the power of invasion. In a Memorandum Decision filed March 1, 1956, the court held: No marital deduction should be permitted. The facts of this case (size of the estate, age of the spouse, inter vivos transfer of some assets to the remaindermen) indicate that testator intended to establish only a life estate together

with remainders. The law of New York has been and is that such a disposition is a life estate rather than a power of appointment. Matter of Woollard does nothing to change this rule. Testator's spouse could dispose of the corpus of this trust by appointment only through an act of bad faith.

Staff: United States Attorney Theodore F. Bowes (N.D. N.Y.); Lester L. Gibson and Jerome S. Hertz (Tax Division).

CRIMINAL TAX MATTERS

Appellate Decisions

Indictment - Conclusive on Issue of Probable Cause (even though Based Entirely upon Evidence in Nature of Hearsay) when Returned by Legally Constituted Grand Jury. Costello v. United States (Sup. Ct., March 5, 1956). In this case the Supreme Court has handed down a sweeping decision which should greatly reduce the number of motions for inspection of grand jury minutes and motions to dismiss indictments on the ground that they were returned upon incompetent evidence. Costello had demonstrated at his trial on charges of income tax evasion that none of the Government's witnesses had appeared before the grand jury except the three Treasury agents who had investigated the case. He argued that since these witnesses had no personal knowledge of his affairs their testimony (not being preceded, as at the trial, by foundation witnesses who identified documents and testified to specific transactions) must have been only hearsay, and that the indictment should have been dismissed because it was based entirely upon incompetent evidence. Costello relied mainly on the Fifth Amendment, which provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."

The Court affirmed the conviction in a unanimous opinion, resting its decision mainly on the history of the grand jury in England and in this country. The Court pointed out that grand juries, being composed of laymen, traditionally were "not hampered by rigid procedural or evidential rules" and could indict upon "such information as they deemed satisfactory". The heart of the broad holding is found in these words: "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." (Emphasis added.)

Justice Burton, concurring in a separate opinion, expressed the view that the sweep of the Court's opinion was broader than the facts required, and cautioned that much of the Fifth Amendment's protective value to the private citizen would be lost if an indictment could not be quashed even on a showing that the grand jury had before it "no substantial or rationally persuasive evidence". He agreed, however, that in the instant case the testimony of the agents, while technically hearsay, was "rationally persuasive of the crime charged and provided a substantial basis for the indictment."

In some districts the United States Attorneys have followed the practice of calling before the grand jury, in addition to the Treasury agent or agents, at least one witness who could give "competent" first-hand testimony relating to the taxpayer's affairs, so that it could not properly be said that the indictment rested solely on incompetent evidence. No doubt this precaution was instituted in deference to the rule expressed in some cases (e.g., Nanfito v. United States, 20 F.2d 376, 378; Brady v. United States, 24 F.2d 405) that an indictment would be quashed if it appeared that there was no competent evidence before the grand jury. The Costello decision plainly renders this precaution unnecessary. On the other hand, it should be borne in mind that the presentation to the grand jury affords the Government a fine opportunity to fill gaps in the evidence which may have been left by the special agent's investigation, particularly where potentially hostile witnesses have not been "nailed down" by having signed an affidavit.

Staff: Marvin E. Frankel (Solicitor General's Office)
Richard B. Buhrman (Tax Division)

Extraneous Jury Contact, Presumption of Prejudice. Remmer v. United States (No. 156), October Term 1955, Decided March 5, 1956. Petitioner was convicted on four counts of a six count indictment charging wilful attempted evasion of income taxes. The trial lasted three months. The Government's case was based upon the net worth and expenditures method of proof. The case was before the Supreme Court previously. Upon the Government's confession of error on the failure of the trial court to grant a hearing with respect to alleged extraneous contacts with a juror during trial, the case was remanded to the District Court with directions to hold a hearing to determine "the circumstances [of the incident complained of] the impact thereof upon the juror, and whether or not it was prejudicial." Remmer v. United States, 347 U. S. 227, 230. A three day hearing was held pursuant to the mandate and the District Court found and concluded that the incident complained of was harmless to petitioner. The Court of Appeals affirmed. See Bulletin, June 24, 1955, p. 21. Certiorari was granted limited to the question whether the extraneous contacts with a juror during trial about a matter pending before the jury were harmful to petitioner. Bulletin, October 28, 1955, p. 17. The Supreme Court held that the evidence adduced at the hearing established that the extraneous jury contacts were prejudicial to petitioner and ordered a new trial.

The hearing disclosed that the extraneous contacts involved juror Smith, a real estate and insurance broker in Reno, Nevada, who became foreman of the jury. After the trial had been in progress three weeks, Smith was visited in his home by Satterly and his wife who called to discuss an insurance matter. Satterly had been employed as a dealer of craps in gambling clubs in Reno. During the prosecution years, petitioner had operated gambling clubs in California and Nevada. In the course of conversation, Satterly said to Smith: "I know [petitioner] very well. He sold Cal - Neva [a gambling club] for $850,000 and really got about $300,000 under the table which he daren't touch. Why don't you make a deal with him." Smith immediately reminded Satterly that he was on the jury and could not talk about the case. Nothing more was said about the case. Smith was disturbed by the remark and reported it to the trial judge who told Smith he should regard it as a joke. The judge related the incident to the prosecutor and they decided to refer the matter to the F.B.I. for investigation to determine whether an improper approach had been made to the juror. Shortly thereafter Smith was interviewed at his place of business by an F.B.I. agent relative to his conversation with Satterly. Smith was never advised of the result of the investigation. A month after the trial was concluded, the Government determined that further investigation or criminal prosecution of Satterly was unwarranted. Driving home after the trial with two other jurors, Smith mentioned that there was some question as to whether he had been approached during the trial and that he had reported the incident to the trial judge. He thanked one of the jurors on dropping her at her home for working with him on the jury "because I have been under terrific pressure * * * sometime I will discuss it." In setting aside the conviction and ordering a new trial, the Court observed: "We think this evidence, covering the total picture, reveals such a state of facts that Mr. Smith or no one else could say that he was not affected in his freedom of action as a juror. * * * He had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made."

Staff: Joseph M. Howard, John J. McGarvey (Tax Division); John R. Benney (Solicitor General's Office)

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ANTITRUST DIVISION

Assistant Attorney General Stanley N. Barnes

SHERMAN ACT

Indictment and Complaint Under Section 1. United States v. J. P. Seeburg Corp., et al., (N.D. Ill.). On March 2, 1956, a federal grand jury in Chicago indicted J. P. Seeburg Corporation, a Chicago manufacturer of coin operated phonograph machines, on charges that it had engaged in a combination and conspiracy with its distributors in restraint of trade in violation of Section 1 of the Sherman Act. At the same time a civil action was filed against the same Corporation and its 31 distributors located throughout the United States. The civil action contains the same charges as are made in the criminal indictment.

The indictment and complaint describe the Corporation as the largest manufacturer of coin operated phonographs in the United States, with retail sales alleged to be at least $20,000,000 a year. The indictment and complaint charge that distributor defendants have entered into an agreement with Seeburg not to compete with each other in the sale of Seeburg products; that each distributor refuses to sell these products to persons located outside the territory allotted to it by Seeburg; that distributor defendants refused to sell Seeburg products to "location owners" who are persons who operate restaurants, taverns and other places where coin operated phonographs are placed for use by the public; that distributors refuse to sell phonographs to any person who sells them to location owners; and that the result is that location owners are compelled to obtain their machines on a loan basis from operators.

The civil complaint requests the court to issue an injunction preventing defendants from imposing any restrictions upon the persons to whom, or the territories within which, Seeburg distributors may resell coin operated phonographs, and for an order requiring the distributor defendants to sell Seeburg products to any person willing to pay cash.

Staff: Earl A. Jinkinson, Harold E. Baily and James E. Mann. (Antitrust Division)

Complaint under Section 1. United States v. Lyman Gun Sight Corporation, et al. (District of Columbia). A complaint was filed in the District of Columbia, February 29, 1956, charging restraints of trade in the distribution and advertising of optical rifle scopes. Four corporations and three individuals were named defendants.

These parties and the subject matter are the same as in the pending criminal action. The complaint alleges that defendants have engaged in an unlawful combination and conspiracy to eliminate "off-list dealers," that is, dealers who do not adhere to the manufacturers' list prices. Toward this end defendants have agreed, among other things, to deny to "off-list dealers" access to supplies of scopes and access to appropriate advertising media. The purpose of these boycotts is alleged to be

stabilization and maintenance of prices for scopes.

Relief is sought in the form of injunctions against agreements by defendants to fix resale prices and to refuse to sell scopes to "off-list dealers." It is prayed that defendants be enjoined for such time as may be reasonably necessary from making, enforcing or adhering to any fair trade resale price maintenance contracts. In addition, the complaint seeks such orders with respect to advertisements submitted to defendant publishers as may be necessary to restore competition in the advertising and sale of scopes.

Staff: James L. Minicus, William H. Crabtree, Forrest A. Ford and Hugh M. Shafer, Jr. (Antitrust Division)

Consent Judgment in Section 1 and 2. United States v. Lee Shubert, et al. (S.D. N.Y.). On February 17 the Shubert case was terminated by the entry of a consent judgment. In the complaint there were three sets of defendants, the two Shubert brothers and a corporation controlled by them, the United Booking Office controlled jointly by Marcus Heiman and the Shuberts, and Marcus Heiman and a corporation controlled by him. The complaint had charged defendants with violating Sections 1 and 2 of the Sherman Act by conspiring to restrain and monopolize trade and commerce in the legitimate theatre business. The complaint asked that defendants be divested of their interest in the booking branch or the presentation branch of the business and that they divest themselves of such theatres as necessary to restore competition.

In December of 1953 the complaint was dismissed by the District Court on the ground that the Toolson case, 346 U.S. 356, was applicable to the legitimate theatre business and therefore interstate commerce was lacking. This ruling was reversed by the Supreme Court in February 1955.

The judgment requires the Shubert and Heiman defendants to divest themselves of their interest in United Booking Office, which organization books legitimate attractions into theatres all over the country. Defendants are also required to divest themselves of theatres in Boston, Chicago, Cincinnati, Detroit, New York City and Philadelphia. During the pendency of the suit, defendants divested themselves of their interest in theatres in Pittsburgh, Toledo and Washington. The judgment requires defendants to secure court approval before they make any addition to their present theatre holdings. Defendants are enjoined from having any interest in theatres with actual or potential competitors. Provisions of the judgment ensure that UBO will operate a booking agency for producers and theatre operators on an impartial basis.

The judgment prohibits discriminatory practices on the part of defendants. It also prohibits defendants from compelling producers or theatre operators to accept certain restrictive requirements as a condition for contracting with them with respect to the production, booking or presentation of a legitimate attraction. Similar prohibitions relate to advertising and theatre tickets.

Simultaneously with the judgment there was filed a stipulation with the executors and trustees of one of the individual defendants who had died prior to the suit. Under the stipulation the executors agree to be bound and become parties to the judgment in the event that they participate in the operations of the theatrical business or have an interest in the theatres, as executors or trustees.

Staff: Philip Marcus, Samuel Weisbard, Estella L. Baldwin, Joseph W. Stanley, Lewis T. Sweet, Jr., and Max Freeman (Antitrust Division)

Government Motion to Affirm Granted. The Mac Investment Company v. United States (Sup. Ct. No. 558). On February 27, 1956 the Supreme Court granted the Government's motion to affirm the judgment of the District Court in this case. The appeal by Mac Investment Company raised the question of the illegality of patent pooling agreements containing provisions for allocating fields of manufacture among the parties. The appeal also raised the question whether testimony as to alleged conversations with deceased persons by a witness whose interests are antagonistic to those of appellant is admissible where such testimony is not admissible under local law.

The Government argued that the agreements were illegal because they covered an exchange of future patent rights subject to an allocation-of-manufacture scheme, because the agreement contained provisions giving the parties a veto power over future licensees, and because the allocation of manufacture restricted potential competition among the parties. It also argued that the question relating to testimony of conversations with deceased persons was not material to the decision because the decision below would have been the same had the challenged ruling been otherwise.

Staff: Charles H. Weston and Baddia J. Rashid. (Antitrust Division)

CLAYTON ACT

Consent Judgment in Section 7. Unites States v. General Shoe Corporation, (M.D. Tenn.). On February 17, 1956 the District Court entered a consent judgment terminating the Government's case against the General Shoe Corporation.

The substance of the charges contained in the complaint are set out in Vol. 3, No. 8, p. 14 of the Bulletin of April 15, 1955.

The judgment enjoins General, until October 1, 1956, from acquiring any corporation engaged in the manufacture, distribution or sale of shoes; prohibits it thereafter, until February 16, 1961, from acquiring any such corporations except with the approval of the Government or upon a showing to the satisfaction of the court that the acquisition will not substantially lessen competition or tend to create a monopoly; permits it, after

October 1, 1956, to make acquisitions, without obtaining such approval, in limited situations such as one where the acquired corporation faces imminent bankruptcy or one where it is substantially a replacement for a retail outlet which General has lost; and requires it to sell within two years any stock held by it in any shoe manufacturer or shoe retailer other than one of its subsidiaries.

In order to assure that small shoe manufacturers may have an opportunity to sell their products, through retail outlets owned by General, as the small manufacturers could do before General acquired those outlets, the judgment provides that, for each of the five fiscal years after the date of entry of the judgment General is required to purchase shoes from other manufacturers equal to 20 percent of the total volume of shoes sold by General's affiliated retail outlets. It also requires General to grant to small shoe manufacturers licenses under its patents on a reasonable royalty basis and to furnish for a consideration written manuals and technical assistance to such licensees; and enjoins it (1) from operating any affiliated retail outlets on a low profit margin for the purpose of injuring any independent retail outlet; (2) from knowingly receiving quantity or other discounts which are not available to other shoe manufacturers under like or similar conditions; and (3) from requiring any independent retail outlet to buy from defendant General all or any specified portion of its requirements for shoes.

Staff: Charles F. B. McAleer, James J. Coyle, Edward G. Gruis, Julius H. Tolton and Mark E. Fields.
(Antitrust Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

INDIANS

Interest Denied on Judgment for Attorneys' Fees Payable out of Restricted Property; Reimbursement of Attorney for Expenses Advanced in One Suit Allowed out of Fruits of Another. United States, et al. v. Preston, et al. (C.A. 9, Feb. 23, 1956). In 1953 the Court of Appeals affirmed a decree awarding judgment against an Indian allottee in the amount of $90,000 as fees for the attorneys who had prosecuted the litigation in which the Indian had been found to be entitled to a trust patent allotment. The affirmed decree had also ordered that the Indian's allotment be sold to satisfy the money judgment if it were not otherwise satisfied within six months. United States v. Preston, 202 F.2d 740 (C.A. 9, 1953); see also Arenas v. Preston, 181 F.2d 62 (C.A. 9, 1950). The judgment not having been paid, the District Court in 1953 ordered that a portion of the allotment be sold and for the first time inserted a provision for interest on the fees awarded. No appeal was taken from that order, although the Government had opposed the inclusion of interest. After sale of a portion of the allotment the Court, in 1954, ordered payment of the fees awarded, with interest, out of the proceeds, and also ordered that the attorneys be reimbursed for expenses advanced in companion litigation which had been unsuccessful. The Court of Appeals, holding that the allotment suit was in nature one against the United States and that, therefore, the Court was without any jurisdiction to impose interest on the judgment without the specific consent of Congress, reversed the interest provision even though there had been no appeal from the first order containing the provision. However, the judgment as to reimbursement for expenses advanced in companion litigation was affirmed on the ground that clear error in this respect was not established.

Staff: John C. Harrington (Lands Division)

Railroad Right of Way; Title to Underlying Minerals. United States v. Union Pacific Railroad Company (C.A. 10, Feb. 24, 1956). The Government in this action sought to quiet its title to oil and gas deposits underlying a right of way for the construction of a railroad line granted the company by section 2 of the Act of July 1, 1862, 12 Stat. 489. Section 3 granted also placed lands in fee but provided that "all mineral lands shall be excepted from the operation of the Act." In affirming a judgment in favor of the railroad the Court of Appeals relied on a line of Supreme Court decisions holding that such right-of-way grants were grants of a limited fee. While acknowledging that those decisions were in cases to which the United States was not a party and in which title to underlying minerals was not involved, the Court of Appeals was of the opinion that the decision in Great Northern Ry. Co. v. United States, 315 U.S. 262, which case, however, involved a

right-of-way grant under the Act of March 3, 1875, 18 Stat. 482, indicated that had that case involved a grant such as Union Pacific's, the Supreme Court would have held that the prior limited fee holdings were authority for the conclusion that the railroad owned the subsurface minerals. Accordingly, the Court of Appeals rejected the Government's primary contention that, by reason of a policy prevailing in 1862 of conveying minerals only by acts specifically relating to them, a policy indicated by the exception of mineral lands from the act itself, the underlying minerals did not pass to the railroad. The question of petitioning for certiorari is under consideration.

Staff: Fred W. Smith (Lands Division)

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Alien Ineligible for Citizenship-Right of Reentry-Effect of Savings Clause. Paris v. Shaughnessy (S.D.N.Y., February 14, 1956). Action to review validity of deportation order.

The alien entered the United States for permanent residence in 1950, applied for exemption from military service in 1951-thereby becoming ineligible for citizenship, and reentered the country as a returning resident in April, 1952, and September, 1953. He was ordered deported on the ground that at the time of his last entry, subsequent to the enactment of the Immigration and Nationality Act, he was an excludable alien because of his ineligibility to citizenship. Under the law in effect prior to that Act he was entitled to readmission as a returning resident despite the ineligibility, and he contended that the savings clause of the 1952 Act preserved his right to leave and reenter, despite the express provisions of the 1952 Act commanding the exclusion of such aliens.

The Court rejected this contention, saying that the savings clause, by its very terms, does not continue a right to enter and re-enter the country, irrespective of a change in the law, for it is not one of the categories specifically referred to in the savings clause. The language of the savings clause clearly indicates that all that is preserved by that clause are inchoate rights in the process of determination or acquisition. It would stretch the language of that clause beyond any reasonable construction to conclude that it means that a person who was entitled to be admitted under a preceding act continues to have that right under subsequent acts, merely because he had once been admitted to the United States, and even though the statute had specifically been amended to deprive him of that right of re-admittance.

Staff: United States Attorney Paul W. Williams, Assistant United States Attorney Harold J. Raby (S.D. N.Y.); Roy Babitt (Attorney, Immigration and Naturalization Service).

Suspension of Deportation-Judicial Review. Khouri v. Dulles, Brownell and Swing (D.C.D.C., February 28, 1956). Declaratory judgment action to review decision of Attorney General, acting through Board of Immigration Appeals, refusing to grant suspension of deportation to plaintiff.

Based upon the facts in this case, the Court found that denial of suspension constituted an abuse of discretion since in his view enforcement of the deportation order would create "an unconscionable hardship" upon the plaintiff.

The Court interpreted the recent decisions of the Court of Appeals for the District of Columbia in Melachrinos, Asikese, and Vichos (see Bulletin, Vol. 4. No. 4, p. 131) as permitting judicial relief in a suspension case if it is established that the alien is eligible for that privilege and that deportation would be "unconscionable".

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